5-23-2011

McCormick Intern. USA, Inc. v. Shore Clerk's Record v. 2 Dckt. 38454

Vol. 2 of 8

IN THE SUPREME COURT

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OF THE STATE OF IDAHO

SUPREME COURT DOCKET NO.

38454-2011

NICHOLAS BOKIDES

Third Party Defendant/Appellant/Cross Respondent

vs.

ROBERTA SHORE

Defendant/Third Party Plaintiff/Respondent/Cross Appellant

MITCHELL W. BROWN
District Judge

Appealed from the District Court of the SIXTH Judicial District of the State of Idaho, in and for **FRANKLIN** COUNTY.

C. EDWARD CATHER
Attorney for Appellant

JAMES G. REID
Attorney for Respondent

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FILED
10 MAY 26 PM 3:52
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L Hampton
DEPUTY

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF FRANKLIN

MCCORMICK INTERNATIONAL USA, INC., a corporation Plaintiff, vs. BEAR RIVER EQUIPMENT, INC., a corporation, WILLIAM R. SHORE an individual; and ROBERTA SHORE, an individual, Defendants.	* * *)	Case No. CV 08-327 MEMORANDUM IN SUPPORT OF THIRD-PARTY PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT
ROBERTA SHORE, an individual, Third-Party Plaintiff, vs.	)	

NICHOLAS BOKIDES, an individual,)
)
Third-Party Defendant.)
*
*
*

COMES NOW, Third-Party Plaintiff, Roberta Shore, by and through counsel of record, and hereby submits this Memorandum in support of Third-Party Plaintiff's Motion for Summary Judgment.

INTRODUCTION

The underlying action which resulted in the filing of the Third-Party Complaint is an action by McCormick International USA, Inc. (hereafter "McCormick") against Bear River Equipment, Inc., hereafter "Bear River" for unpaid obligations due by Bear River to McCormick pursuant to various security and financing agreements entered into with respect to the financing of inventory provided by McCormick to Bear River for resale. The underlying action also involves a direct claim by McCormick against William Shore and Roberta Shore, individually, as personal guarantors of the obligations of Bear River.

During the time that Bear River was involved as a dealer selling McCormick equipment, William and Roberta Shore became involved in a divorce proceeding from each other. Roberta Shore engaged the services of Third-Party Defendant, Nicholas Bokides (hereinafter "Bokides") to represent her in the divorce proceeding between herself and William Shore. During the course of the divorce proceeding, Roberta Shore requested that Bokides notify McCormick and Agri-

Credit Acceptance Corporation (hereinafter "Agri-Credit"), the financing company that financed the equipment delivered by McCormick by Bear River for resale, that she wished to cancel her personal guarantee issued to both McCormick and Agri-Credit guaranteeing Bear River's payments of sums due to each. Bokides agreed to write such letters, but failed to do so, which ultimately led to McCormick making a claim against Roberta Shore, individually in this case, to enforce her guarantee obligations.

I. Relevant and Material Facts.

McCormick is a manufacturer of farm equipment with its principal offices in Deluth, Georgia. In 2005, a dealership between McCormick and Bear River was created for the retail sale of McCormick tractors and other farm equipment (see Plaintiff's Statement of Facts in support of Motion for Summary Judgment at pg. 2). In order to finance the acquisition of its inventory from McCormick, Bear River entered into various financing agreements with Agri-Credit which essentially resulted in Agri-Credit paying McCormick for inventory that was delivered to Bear River's lot in Preston, Idaho, Bear River would repay Agri-Credit after the equipment was sold. As Bear River ordered equipment from McCormick, the equipment would be financed or floored through Agri-Credit pursuant to wholesale financing agreements. (See Plaintiff's Statement of Facts in support of Motion for Summary Judgment, pg. 2-3).

On March 22, 2005, William Shore and Roberta Shore executed personal guarantees to Agri-Credit guaranteeing obligations between Bear River and Agri-

Credit from and after March 22, 2005 (see Affidavit of Kevin Peters in support of Plaintiff's Motion for Summary Judgment, Exhibits K and L).

In part, the personal guarantee executed by Roberta Shore on March 22, 2005 provides as follows:

> . . . and that this shall be a continuing guarantee, and shall cover all the liabilities which the dealer may incur or come under until AAC shall have received at its Head Office, written notice from the guarantor or the executor, administrators, successors or assigns of the Guarantor to make no further advances on the security of this guarantee (emphasis added). (Affidavit of Kevin Peters in Support of Plaintiff's Motion for Summary Judgment, Exhibit L.)

In March, 2006, Roberta Shore retained Third-Party Defendant Bokides to represent her in a divorce proceeding between herself and William Shore. She explained the involvement with Bear River and advised Mr. Bokides as follows:

> Mainly, I wanted to -- I was against getting into this business from before we did it, when it first came up. I didn't want anything to do with it and I explained this to Mr. Bokides and I asked him -- one of the things that -- when he was preparing the division of property, that I wanted Bill to have the real property in Preston, I wanted him to have full control of the business, I wanted off of everything that had anything to do with it. (Affidavit of James G. Reid, Exhibit 1).

Roberta Shore provided Bokides a copy of her guarantees in May 2006 and, at that time, asked him to write letters to both Agri-Credit and McCormick canceling her guarantees. He agreed to do so (Affidavit of James G. Reid, Exhibit 1). In Response to Request for Admission, Third-Party Defendant admitted that Roberta Shore requested that he notify certain creditors to make no further

advances to Bear River pursuant to Roberta Shore's personal guarantees and that "he did not notify Agri-Credit Corporation to make no further advances to Bear River pursuant to Roberta Shore's personal guarantee (Afffidavit of James G. Reid, Exhibit 2).

Roberta Shore did not learn that Bokides had failed to notify Agri-Credit and McCormick until she received a demand letter from Agri-Credit making demand upon her pursuant to her guarantee for sums due Agri-Credit as of August 30, 2007 by Bear River (Affidavit of Kevin Peters in Support of Plaintiff's Motion for Summary Judgment, Exhibit H, Affidavit of James G. Reid, Exhibit 2).

According to the underlying Complaint and evidence submitted by McCormick in support of its Motion for Summary Judgment against William and Roberta Shore, eight pieces of equipment were sold by Bear River Equipment subsequent to October 20, 2007, and Bear River Equipment did not pay Agri-Credit after the sales of such equipment pursuant to the agreements between Bear River and Agri-Credit (Affidavit of Kevin Peters in Support of Plaintiff's Motion for Summary Judgment).

After applying all just credits and offsets, McCormick claims that together with interest, the amount due McCormick by Bear River for which Roberta Shore's guarantee applied as of May 12, 2010 is $315,916.14 (Memorandum in Support of Plaintiff's Motion for Summary Judgment, pg. 6).

II. Standard of Review.

Summary judgment is govered by Rule 56, Idaho Rules of Civil

Procedure. The standard of review for a summary judgment motion, as articulated by the Idaho Supreme Court, is as follows:

> Summary judgment is proper if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law . . .. [The] Court should liberally construe all facts in favor of the nonmoving party and draw all reasonable inferences from the facts in favor of the nonmoving party. Summary judgment must be denied if reasonable persons could reach differing conclusions or draw conflicting inferences from the evidence presented. If the moving party challenges an element of the nonmoving party's case on the basis that no genuine issue of material fact exists, the burden then shifts to the nonmoving party to present evidence that is sufficient to establish a genuine issue of material fact ... [t]he nonmoving party must submit more than just conclusory assertions that an issue of material fact exists to establish a genuine issue.

Willie v. Board of Trustees, 138 Idaho 131, 133 (2002) (internal citations omitted).

III. Argument.

A. Bokides is liable to Roberta Shore for the amount of any judgment obtained by McCormick against Roberta Shore in the underlying action based on her personal guarantee.

If Third-Party Defendant, Bokides, had simply done, in May of 2006, what he had agreed to do, notify Agri-Credit and McCormick, in writing, that Roberta Shore no longer wanted to be a guarantor for Bear River Equipment debt, Roberta Shore would not even be a party to this lawsuit. The pieces of equipment for which McCormick is seeking to enforce Roberta Shore's guarantee, were all delivered and sold long after Mr. Bokides agreed to cancel Roberta Shore's guarantee obligations. The earliest that any one piece of

equipment was financed by Bear River was October 20, 2006 (Affidavit of Kevin Peters in Support of Plaintiff's Motion for Summary Judgment, Exhibit D and H). There is no direct evidence as to when any of the pieces of equipment were actually sold triggering Bear River's obligation to pay Agri-Credit (McCormick's assignor), but according to Greg Briggs in his Affidavit, he learned in August of 2007 that equipment had been "sold out of trust."

The actual date of the sale of the equipment out of trust is not material to Roberta Shore's Motion for Summary Judgment as the undisputed facts clearly demonstrate that had Mr. Bokides acted in a reasonable manner following his May 2006 agreement to notify Agri-Credit and McCormick, no reasonable person could conclude that any of the pieces of equipment sold between October 20, 2006 and August 2007 would have been subject to Roberta Shore's personal guarantee.

For a client to prevail on a claim of attorney professional negligence, it must be established that:

1) An attorney-client relationship existed;

2) The existence of a duty on the part of the attorney;

3) The breach of that duty or standard of care owed by the attorney;

4) The breach was the proximate cause of the damages suffered by the client; and

5) The nature and extent of the client's damages.

Spur Products Corp. v. Stoel Rives, LLP, 143 Idaho 812, 815 (2007).

The degree of care required of an attorney is a question of law

determined by the Court, whereas the question of breach of that duty is a question of fact determined by the fact finder. See 7 AM.JUR. 2d *Attorneys at Law*, §224 (2010) See also: *Venabule v. Block*, 225 SE2d 755 (1976).

In this case, there is no question but that Bokides and Roberta Shore had an attorney-client relationship. In order to establish the duty, or standard of care owed by the attorney, a client must generally present expert evidence, *Samuel v. Hepworth, Nungester and Lezamiz*, 130 Idaho 84, 89 (2000). At summary judgment, this means the client must present affidavits of expert witnesses. *Id.* The reason that an expert is needed is because "the factors involved ordinarily are not within the knowledge or experience" of persons not trained in the law. *Id.* However, expert testimony is not necessary "where the attorney's alleged breach of the duty of care is so obvious that it is within the ordinary knowledge and experience of laymen" *Id.* Additionally, expert testimony is not necessary where the professional negligence is alleged to be the "failure of an attorney to follow with reasonable promptness and care the explicit instructions of the client." *Jarman v. Hale*, 122 Idaho 952, 961 (Ct. App. 1992).

"The purpose for which the attorney is retained defines the attorney's contractual duty to his client." *McColm-Traska v. Baker*, 139 Idaho 948, 952 (2004). However, it is a widely accepted rule that "an attorney owes a client a duty to follow the client's explicit instructions with reasonable promptness and care." *Id.* As such, an attorney is liable for damages to a client resulting from the attorney's disobedience of the client's proper instructions. See 7 AM. JUR. 2d *Attorneys at Law* §201 (2010). See also: *Wilcox v. Plummer's Ex'rs, 29 U.S. 172 (1830).*

In this case there is absolutely no question but that Roberta Shore

directed Mr. Bokides, as part of his representation of her in the divorce proceeding with William Shore, to make sure she got off all obligations involving Bear River. There is no question but that this instruction was given to Mr. Bokides in the spring of 2006 (May). Under Idaho law, his failure, as admitted to by Mr. Bokides to follow his client's instructions with "reasonable promptness" constitutes a breach of his duty to his client, Roberta Shore.

Any judgment obtained by McCormick against Roberta Shore is the direct result of Bokides' breach and was proximately caused by his failure to follow her instructions with reasonable promptness.

B. Roberta Shore is entitled to reimbursement of fees expended to defend the claim filed by McCormick.

In Idaho, one of the elements of damage to which a Plaintiff is entitled to as a result of an attorneys' professional negligence is the expenditure of legal fees required to defend against an action filed because of an attorney's professional negligence. *Elliott v. Parsons*, 128 Idaho 723, 725 (1996). In this case, Roberta Shore would not have had to hire the assistance of counsel to defend her against McCormick's claims but for the negligence of her attorney, Bokides, as set forth in the Third-Party Complaint. Therefore, she is entitled to a judgment against Bokides for any attorney's fees or other costs she expended in her defense of the Complaint against her pursuant to her guarantee.

C. Roberta Shore is entitled to her attorney's fees incurred in prosecuting the Third-Party Complaint.

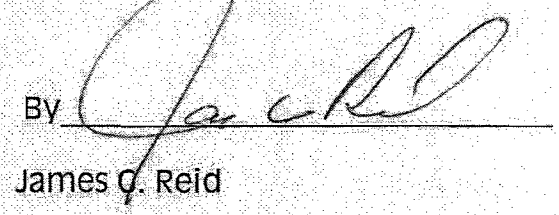
Just recently, the Idaho Supreme Court applied Idaho Code §12-120(3) to a legal malpractice litigation. *City of McCall v. Buxton*, 146 Idaho 656, 201 P.3d 629 (2009). In this case, the legal malpractice action pursued by Roberta Shore against Mr. Bokides resulted from his failure to cancel her personal guarantee executed on behalf of Bear River for its commercial obligations to McCormick. Clearly, the underlying transaction giving rise to her guarantee was commercial in nature and pursuant to *City of McCall, supra*, Roberta Shore is entitled to her reasonable attorney's fees incurred in the prosecution of her Third-Party Complaint.

CONCLUSION

In the event the Court enters Judgment against Roberta Shore pursuant to the Complaint filed by McCormick against Roberta Shore based on her guarantee, she is entitled to summary judgment based on the Third-Party Defendant's negligence in a sum equal to any judgment entered against Roberta Shore in the underlying case, together with her reasonable attorney's fees and costs incurred in the defense of the underlying case and her reasonable attorney's fees and costs incurred in the prosecution of the counterclaim.

Respectfully submitted this 26 day of May, 2010.

RINGERT LAW CHARTERED

By 

James C. Reid

CERTIFICATE OF SERVICE

I hereby certify that on the 26 day of May, 2010, a true and correct copy of the foregoing was served upon all parties listed below by:

( ) U. S. mail, postage prepaid
( ) hand delivery
( ) express mail
(x) facsimile

Steven R. Fuller
Steven R. Fuller Law Office
24 North State
P.O. Box 191
Preston, ID 83262

Ed Cather
Moffatt, Thomas
P.O. Box 51505
Idaho Falls, ID 83405-1505

James G. Reid

FILED

10 MAY 26 PM 3:52

FRANKLIN COUNTY CLERK

L Hampton

DEPUTY

JAMES G. REID, ISB #1372
LAURA E. BURRI, ISB #3573
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455 S. Third, P. O. Box 2773
Boise, Idaho 83701-2773
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Attorneys for Defendants

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF FRANKLIN

MCCORMICK INTERNATIONAL USA, INC., a corporation Plaintiff, vs. BEAR RIVER EQUIPMENT, INC., a corporation, WILLIAM R. SHORE an individual; and ROBERTA SHORE, an individual, Defendants.	)	Case No. CV 08-327 AFFIDAVIT OF JAMES G. REID IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT
ROBERTA SHORE, an individual, Third-Party Plaintiff, vs.	)	

NICHOLAS BOKIDES, an individual,)
)
Third-Party Defendant.)
*
*
*

STATE OF IDAHO)
) ss.
COUNTY OF ADA)

JAMES G. REID, being first duly sworn upon oath, deposes and states the following in **SUPPORT** of *Third-Party Plaintiff's Motion for Summary Judgment*.

1. That I am an individual over the age of eighteen, am a resident of the State of Idaho, and have personal knowledge of the facts set forth herein, believing them all to be true and correct to the best of my knowledge and belief.

2. That I am an attorney licensed to practice law in the State of Idaho and represent the interests of Third-Party Plaintiff Roberta Shore in the above-titled action.

3. That attached here to as **Exhibit A** is a true and correct copy of the Deposition of Roberta S. "Bobbie" Shore taken in this action on January 5, 2010.

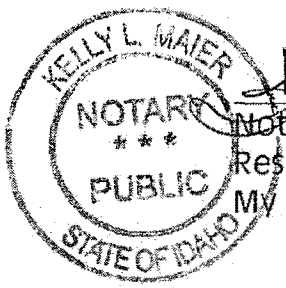
4. That attached hereto as **Exhibit B** is a true and correct copy of page 14 of Third-Party Defendant's Answers and Responses to Third-Party Plaintiff's Interrogatories, Requests for Production and Admissions.

DATED this 26 day of May, 2010.

RINGERT LAW CHARTERED

By _____
James G. Reid

Sworn to and subscribed before me this 26 day of May, 2010.



_____
Notary Public for Idaho
Residing in Boise, Idaho
My Commission expires: 3/12/14

CERTIFICATE OF SERVICE

I hereby certify that on the 26 day of May, 2008, a true and correct copy of the foregoing was served upon all parties listed below by:

(✓) U. S. mail, postage prepaid
( ) express mail
( ) hand delivery
(✓) facsimile

Steven R. Fuller
Steven R. Fuller Law Office
24 North State
P.O. Box 191
Preston, ID 83262

Ed Cather
Moffatt, Thomas
P.O. Box 51505
Idaho Falls, ID 83405-1505

James G. Reid

EXHIBIT A

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF FRANKLIN

McCORMICK INTERNATIONAL USA, INC., a corporation,	)	COPY
Plaintiff,	)	
vs.	)	Case No. CV 08-327
BEAR RIVER EQUIPMENT, INC., a corporation; WILLIAM R. SHORE, an individual; and ROBERTA SHORE, an individual,	)	
Defendants.	)	As per request exhibits not provided

DEPOSITION OF ROBERTA S. "Bobbie" SHORE

JANUARY 5, 2010

REPORTED BY:

MICHAEL S. LUCERO, CSR No. 255

Notary Public

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF FRANKLIN

McCORMICK INTERNATIONAL USA, INC., a corporation,
Plaintiff,
vs.
BEAR RIVER EQUIPMENT, INC., a corporation; WILLIAM R. SHORE, an individual; and ROBERTA SHORE, an individual,
Defendants.

Case No. CV 08-327

DEPOSITION OF ROBERTA S. "Bobbie" SHORE
JANUARY 5, 2010

REPORTED BY:
MICHAEL S. LUCERO, CSR No. 255
Notary Public

THE DEPOSITION OF ROBERTA S. "Bobbie" SHORE was taken on behalf of Defendant Nicholas Bokides, at the offices of Ringert Law Chartered, 455 S. Third, Boise, Idaho, commencing at 11:04 A.M., on Tuesday, January 5, 2009, before Michael S. Lucero, Certified Shorthand Reporter and Notary Public within and for the State of Idaho, in the above-entitled matter.

APPEARANCES:

For Plaintiff:
Steven R. Fuller Law Office
BY MR. STEVEN R. FULLER
24 North State
P.O. Box 191
Preston, Idaho 83262

For Defendants and Third-Party Plaintiff Roberta Shore:
Ringert Law Chartered
BY MR. JAMES G. REID
455 S. Third
P.O. Box 2773
Boise, Idaho 83701-2773

APPEARANCES (Continued:)

For Defendant Nicholas Bokides:
Moffatt, Thomas, Barrett, Rock & Fields, Chartered
BY MR. CHARLES EDWARD CATHER, III
420 Memorial Drive
P.O. Box 51505
Idaho Falls, Idaho 83405

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(Exhibit Nos. 1 through 4 marked.)
ROBERTA S. "Bobbie" SHORE,
first duly sworn to tell the truth relating to said cause, testified as follows:

EXAMINATION

QUESTIONS BY MR. CATHER:

Q. Good morning, Ms. Shore.
A. Good morning.
Q. Could you please state your full name for the record.
A. Roberta Shore.
Q. Have you been known by any other names in the past?
A. Yes.
Q. Can you please state those.
A. Roberta Corey, Roberta Parkhill, and my maiden name is Roberta Stewart.
Q. Now, this is the time and the place for your deposition in the case of McCormick International USA, Inc., versus Bear River Equipment, William R. Shore, and Roberta A. Shore. And it's Case No. 2008-327, District Court of the Sixth Judicial District of Idaho, Franklin County. And this deposition is being taken pursuant to the Idaho Rules of Civil

Procedure.
By introduction, my name is Ed Cather. I am the attorney for Nick Bokides. And have you ever had your deposition taken before?
A. No.
Q. Okay. Just a couple of ground rules. First, as you're aware, you're under oath.
A. (Nods).
Q. It's important that we don't talk at the same time. So I'll ask a question, and if you can wait till I'm finished and then you respond, and I'll try to extend you that same courtesy. It's a little difficult to keep a record.
It's also important that you answer the questions audibly. We can't nod our heads or shake our heads.
And if there's any time you don't understand a question, just ask me to rephrase it or just tell me you don't understand it. I'm not trying to trick you. I'm just trying to establish a record.
Are you able to competently testify today? Are you under medication or anything that would impact your testimony?

A. No.
Q. All right. What is your current address?
A. 830 Jonathan Road, Weiser, Idaho 83672.
Q. Okay. What is your date of birth?
A. [redacted].
Q. Okay. Bobbie, where were you born?
A. Pyote, Texas.
Q. Now, where did you grow up?
A. Quite a few different places.
Q. Okay.
A. Do you want them all?
Q. Sure.
A. Alaska, Utah, Oklahoma, Florida, Idaho.
Q. Okay. How long have you been in Idaho?
A. Since 1988.
Q. Okay. Do you have any other family in the area?
A. No.
Q. Okay. What brought you to Idaho?
A. Bill Shore.
Q. Okay. Now, did you review any documents or records in preparing for this deposition?
A. Yes.

Q. What documents did you review?
A. Our answers to the interrogatories.
Q. Okay. And you reviewed those with your attorney?
A. No.
Q. Just by yourself?
A. Mm-hmm.
Q. Okay. Anything else?
A. Hm-mmm.
Q. Okay.
MR. FULLER: She's going to have to answer yes or no. I don't think he can take down an mm-hmm or hm-mmm.
THE WITNESS: That last answer was no, then.
MR. REID: Yeah, you've got to remember to answer yes or no or audibly.
THE WITNESS: I'm sorry.
Q. (BY MR. CATHER) Now, did you ever make a recorded statement in this case?
A. No.
Q. Okay. Have you ever been involved in any other lawsuits of any kind?
A. Yes. One.
Q. Okay. What was that?

A. With Rodney Petersen.
Q. Okay. And that was over in Franklin County?
A. Yes.
Q. Okay. Are you currently married?
A. No.
Q. Okay. Can you list your prior marriages, to who? To who were you married to previously?
A. Gordon Corey, who's deceased.
Q. Okay.
A. Jan Parkhill and then Bill Shore.
Q. Okay. When did you marry Gordon Corey?
A. 1976.
Q. Okay. And how long were you married?
A. Till he died in 1985.
Q. Okay. Did you have any children from that marriage?
A. No.
Q. Okay. And then your next? Was it Jan Parkhill?
A. That was the first one.
Q. Oh, I'm sorry.
A. 1966 to '72.
Q. Okay. Any children from that marriage?

A. One. Deceased.
Q. Okay. And then to Bill Shore?
A. Yes.
Q. And when did you marry Bill?
A. 1991.
Q. And how long were you-all married?
A. Fifteen years. Until '06.
Q. Okay. All right. Did you complete high school?
A. Yes.
Q. Where?
A. Florida.
Q. And what year did you graduate?
A. '63.
Q. Okay. Did you pursue any post-high school education?
A. No.
Q. Okay. Do you have any other vocational or educational training?
A. Banking.
Q. Okay. What type of banking training?
A. I worked in various departments of banks --
Q. Okay.
A. -- for 20-some years.

Q. Okay. Are you currently employed?
A. No.
Q. Okay. What was your last job that you had?
A. For somebody else?
Q. Yes.
A. When I married -- I quit working when I married Gordon.
Q. Okay.
A. Which would have been '76.
Q. Okay. So your 27 years of banking were from --
A. Previous.
Q. Basically ended at that point?
A. Mm-hmm.
Q. Okay. So what jobs did you hold, I guess, from high school till you married Gordon; do you recall?
A. Yeah. Well, just in the banking.
Q. Okay.
A. From new accounts to -- worked my way up into the trust department. And when I quit, I was the -- an officer in the trust department over the operations.
Q. And who was your employer?

A. It was Farmers & Merchants Bank in Tulsa, Oklahoma.
Q. Okay. Is that the only bank you ever worked for?
A. No. I worked for -- in Oklahoma City before that. I think it was Fidelity Bank.
Q. Okay.
A. And that was the first -- my first job.
Q. So what were your duties as a trust officer?
A. I was in charge of the operations, all the recordkeeping and posting and the vault, and I had three employees under me that took care of -- and I oversaw everything.
Q. Okay. So did you review legal documents as part of that employment?
A. No. No. We kept track of them but, no, that wasn't part of -- the actual trust agreements, the officers, the trust officers took care of that.
Q. Okay. All right. Let's talk about Bear River Equipment. Do you know when that was formed?
A. March 1, 19- -- or 19- -- 2005.
Q. And I'm referring to Bear River

Equipment, Incorporated, when I say, "Bear River." Is that okay?
A. Yes.
Q. Okay. What was the business or what is the business of Bear River Equipment?
A. Was.
Q. Was. Okay.
A. Farm equipment.
Q. Okay. What did they do with the farm equipment?
A. Sold it.
Q. Okay. Who were the original shareholders in 2005?
A. Bill Shore and myself.
Q. Are you currently a shareholder?
A. No.
Q. You said, "was." Do you know when Bear River Equipment was dissolved?
A. I'm not sure officially. It ceased doing business in I believe it was August of '07.
Q. Okay.
A. I'm not positive.
Q. Okay. While you were a shareholder, did you-all have shareholder meetings?
A. No.

Q. Who were the original directors of Bear River Equipment?
A. There was no one except Bill and myself.
Q. Okay. So you were the shareholders and the directors?
A. (Nods).
Q. Okay. Did you have board meetings?
A. No.
Q. Okay. Who were the original officers, just you and Bill?
A. Yes.
Q. Okay. What was your title at Bear River Equipment?
A. I was, I guess, the secre- -- corporate secretary.
Q. Okay. And was Bill the president?
A. Mm-hmm. Yes.
Q. Okay. What were your duties as an officer of the corporation?
A. I really don't know.
Q. Okay. Did you oversee any activities?
A. No. Bill did.
Q. Okay. So you were the secretary, but you weren't involved in the corporation; is that

correct?
A. Yes.
Q. Okay. Who managed Bear River Equipment?
A. Tom Lewis.
Q. Tom Lewis. And what was his title?
A. Manager.
Q. Manager. Was Mr. Lewis ever an officer or shareholder of the corporation?
A. No.
Q. Okay. Did Mr. Lewis oversee the day-to-day operations of Bear River?
A. Yes.
Q. Okay. Who did Mr. Lewis report to?
A. Bill.
Q. And what was Bear River Equipment's involvement with McCormick?
A. Bear River Equipment sold McCormick tractors.
Q. Okay. Do you recall what other tractors they sold, that Bear River Equipment sold, besides McCormick International tractors?
A. As far as tractors go, that was, I believe, the only new line.
Q. Okay. Did Bear River Equipment have a

license agreement with McCormick?
A. I'm not sure what you mean by "license agreement."
Q. Did they have an agreement to exclusively sell McCormick tractors?
A. I don't know if that -- if you're asking can they also sell other tractors, I don't know.
Q. All right. I'm going to hand you what's --
MR. CATHER: Okay. I apologize. I'm going to start with Exhibit 2.
MR. REID: Okay. That's fine.
MR. CATHER: I'm going to hand you what's been marked as Exhibit No. 2. Bobbie, can you please review that.
(Witness is reviewing.)
Q. (BY MR. CATHER) Are you familiar with that document?
A. Yes.
Q. Okay. Is that your signature in the bottom left-hand corner?
A. Yes.
Q. Okay. And the signature above yours, whose is that?

A. Bill's.
Q. Okay. This is the guaranty agreement executed by Bill Shore and yourself; is that correct?
A. Yes.
Q. Okay. Why did you execute this agreement?
A. Because Bill told me to.
Q. Okay. Do you know why he told you to; do you recall?
A. Well, because he wanted to operate this business, to get it going, and they wanted to sell McCormick tractors.
Q. Okay. Do you recall why McCormick needed you to execute a guaranty?
A. I think -- and I'm not positive, but I think that if the major person that was doing it was married, they made -- it was their policy that the spouse had to sign, too.
Q. Okay.
A. That's my impression. I don't know if that's exact.
Q. Okay. Can I get you to read the second paragraph of that agreement where it begins with "This." Can you read that out loud, please.

A. "This Agreement shall continue in effect until you receive written notice that it is terminated and until all sums of money then owing are paid."
Q. What is your understanding as to what that sentence means?
MR. REID: And just for the record, to the extent you're asking her to state a legal conclusion, I'll object. If you're just asking her general understanding, that's fine.
Q. (BY MR. CATHER) Just your understanding.
A. My understanding is that the persons that signed -- people that signed it agree to pay McCormick for their tractors.
Q. Okay. Now, it says -- I'm going to read this. It says, "... shall continue in effect until you receive written notice that it is terminated ..." Does that mean anything to you?
A. It means what it says.
Q. Okay. What does that say?
A. Am I a second grader or what?
MR. REID: You just asked the $64,000 question.

THE WITNESS: That the notice could be terminated if given written notice.
Q. (BY MR. CATHER) Okay.
A. I mean the guaranty could be terminated if given written notice.
Q. And now I'm referring to that next part of that sentence after "and." It says, "... and until all sums of money then owing are paid." What does that mean to you?
A. I would say that that would mean that upon written notice to terminate it, that sums of money owing would have to be paid in order to terminate it.
Q. Okay. And just one more question regarding this agreement. Where it says, "you," who is that referring to?
A. Which place?
Q. Again, that same second sentence.
A. Oh. "... until you receive ..."?
Q. "... until you receive written notice ..."
A. Well, my impression would be that the "you" is me -- is who signed it, but I don't think that's the way it's supposed to be.
Q. Okay.

A. Which is it?
Q. If we go up to the beginning, it says, "In consideration of your extending credit ..." This is a letter from you and -- basically, it's written in letter form, almost, from William Shore and yourself to McCormick.
A. Okay. If it's from us, then "you" would mean McCormick.
Q. All right. Now I'm going to hand you what's been marked as Exhibit No. 1. This is another guaranty. And I'm basically going to have the same questions regarding this guaranty.
Are you familiar with this one?
A. Yes.
Q. Okay. Who are the parties to this guaranty?
A. Bear River Equipment --
Q. Okay.
A. -- and Agricredit.
Q. Okay. And who's the guarantor also?
A. On this one it is for me, Roberta Shore.
Q. Okay. All right. So am I correct, then, that the parties to the agreement are yourself, Bear River, and Agricredit?

A. Yes.
Q. Okay. Who is Agricredit Acceptance LLC?
A. To my understanding they're the financial arm -- the people who finance the tractors for McCormick.
Q. Okay. So why did you-all need to sign this guaranty; do you recall?
A. Are you asking we or me?
Q. Why did you sign that?
A. Why did I?
Q. Yes.
A. Because Bill Shore told me to.
Q. Okay. Do you know why this guaranty was required in addition to the first one, the McCormick one? Why was a second required for Agricredit?
A. No, I really don't.
Q. Okay. That's fair enough.
Okay. Can we turn to the second page of that. What day was the agreement signed?
A. March 22, 2005.
Q. Okay. Is that your signature?
A. Yes, it is.
Q. Okay. And who is Doug Fisher?

A. He represented Agricredit.
Q. Okay. What was the purpose of the guaranty?
A. You know, I -- I don't really understand it, other than it's the same purpose as the McCormick one.
Q. Okay.
A. If it's different, I don't know.
Q. Okay. So am I correct in saying that your understanding is so they would extend you credit, you had to sign the guaranty, so that they would extend credit to Bear River?
A. I really have always been confused about that because Agricredit financed the tractors for them, the customer.
Q. Okay.
A. And then Agricredit paid McCormick. Why Bear River had to sign it, I don't know.
Q. Okay. All right.
A. I really don't understand it.
Q. Okay. Not to go through the whole guaranty, but I would just like to go to paragraph 4, and I'd like to get you to read that out loud.
A. "And that this shall be a continuing

guaranty, and shall cover all the liabilities which the Dealer may incur or come under until AAC shall have received at its Head Office, written notice from the Guarantor or executor, administrators, successors or assigns of the Guarantor, to make no further advances on the security of this guaranty."
Q. Okay. Before I ask you what that means to you, who is the guarantor?
A. On this particular one --
Q. Yes.
A. -- I guess it's me.
Q. Yes. Okay. And who is the dealer as defined in this agreement?
A. Bear River Equipment.
Q. Okay. All right. So what does this paragraph mean to you? What is your understanding of this paragraph?
MR. REID: Again, with the understanding you're not asking her a legal conclusion?
MR. CATHER: No.
THE WITNESS: I hope not because it wouldn't be right. Okay. That it's continuing and the liabilities -- that it's going to

continue until they receive written notice from the guarantor to make -- yeah. Okay. That it's going to stay in -- in effect until they received written notice.
Q. (BY MR. CATHER) Okay. So is it your understanding that this guaranty was going to remain in effect until you gave them notice that you would no longer guarantee --
A. Mm-hmm.
Q. -- any sums or advances of this agreement?
A. Mm-hmm.
Q. Is that correct?
A. Mm-hmm.
Q. Okay.
MR. REID: You have to answer audibly.
THE WITNESS: Oh, I'm sorry. Yes.
Q. (BY MR. CATHER) Okay. Let's put those aside for a little bit. And I apologize. Now I'm going to turn to your divorce from Bill Shore just a little bit. Who represented you in your divorce?
A. Nick Bokides.
Q. When did you retain Mr. Bokides?
A. Approximately March 1, 2006.

Q. Okay. What was the purpose?
A. Divorce.
Q. Okay. Did you-all have a written agreement as to the scope of his representation?
A. I don't think so. I don't remember.
Q. Okay. When you first met with Mr. Bokides, did you discuss what you wanted him to do?
A. The first day? No.
Q. Okay.
A. The first day was after a very traumatic experience and I don't remember what all he asked me.
Q. Okay.
A. I really don't, if you're talking about the first day.
Q. Okay. And I apologize. I don't want to go into the reasons for your divorce.
A. Good.
Q. And I don't want to bring that up, but I just want to talk about his actual representation; okay?
A. Okay.
Q. Did you discuss your involvement with Bear River Equipment with Mr. Bokides?

A. Yes.
Q. Okay. What was discussed?
A. Mainly, I wanted to -- I was against getting into this business from before we did it, when it first came up. I didn't want anything to do with it, and I explained this to Mr. Bokides, and I asked him -- one of the things that -- when he was preparing the division of property, that I wanted Bill to have the real property in Preston. I wanted him to have full control of the business. I wanted off of everything that had anything to do with it.
Q. Okay. Do you recall Mr. Bokides' response?
A. He just said fine or okay or something, and I gave him all the paperwork.
Q. Okay. Did he indicate what steps he was going to take to terminate your involvement with Bear River?
A. When I gave him the documents and asked him to send the letters on the guaranties and to do -- make -- to prepare the deed to transfer the real property, and he just took -- I mean made notes like he always did and said that he would take care of it --

Q. Okay.
A. -- like he did everything else.
Q. When you said you gave him documents, do you recall what documents you gave him?
A. The copies of the guaranties.
Q. Just the guaranties?
A. Concerning Bear River, I think that was it.
Q. And you're referring to the guaranties that have been marked as Exhibits 1 and 2?
A. Yes.
Q. Okay.
A. There was one more, one more guaranty, which was one of the first ones Bill was able to settle, and so it didn't come up.
Q. Okay. Now, as part of your proceeding, you entered into a stipulation as to how the property was going to be divided. Do you recall that stipulation?
A. Mm-hmm. Yes.
Q. What was your agreement with Bill Shore as to Bear River Equipment?
A. That he would receive everything and that I would have nothing to do with it.
Q. Okay. So pursuant to that agreement,

who would be responsible for the debts and liabilities of Bear River Equipment?
A. Bill Shore.
Q. And what would happen with your shares of Bear River Equipment?
A. No shares were ever printed or anything like that, so it just dissolved.
Q. But pursuant to your decree, Bill would become the sole owner --
A. Yes.
Q. -- of Bear River Equipment, Incorporated?
A. Yes.
Q. Okay. And he would also be responsible for all the debts and liabilities?
A. Yes.
Q. When was your divorce from Bill finalized?
A. November 16, 2006.
Q. Okay. Bobbie, I'm going to hand you what's been marked as Exhibit No. 3. Now, that's the decree of divorce that was entered in your case. Are you familiar with that document?
A. Mm-hmm. Yes.
Q. Okay. Just turn to page 2, Article 3,

and I'm just going to read this. It says, "Defendant is awarded the following property as his sole and separate property." It refers to the Preston, Idaho, real estate?

A. Mm-hmm. Yes.

Q. Is that what you're referring to needed to be deeded to Bill Shore?

A. Yes.

Q. All stock in Bear River Farm Equipment, Inc.?

A. Yes.

Q. Okay. I'd like you to turn to page 4, and it refers to defendant, which is William R. Shore or Bill Shore. It says, "Defendant shall pay when due, and hold the Plaintiff harmless from the following indebtedness." And I'm just going to go down to the third sentence there. It says, "All indebtedness related to the closely held corporation Bear River Farm Equipment, Inc., including, but not limited to, any claims or litigation against the parties arising out of the business operated by Bear River Farm Equipment, Inc., including attorney fees and costs."

Is that a correct reading of that?

A. Yes.

Q. What do those sentences mean to you? Again, I'm not asking for a legal conclusion.

MR. REID: Okay.

Q. (BY MR. CATHER) What is your understanding?

A. That Bill Shore is responsible for Bear River Equipment.

Q. Okay. Is it your understanding that he's responsible for any claims against Bear River Equipment?

A. Yes.

Q. Is it your understanding that he's responsible for any claims arising from the operation of Bear River Equipment?

A. Yes.

Q. Now, have you reviewed the complaint filed by the plaintiff in this matter?

A. Be specific as to what document you're talking about.

Q. The complaint.

A. From McCormick?

Q. Correct.

A. I have at one time.

Q. Okay. And did you review the amended complaint filed?

A. I have.

Q. Okay.

A. A long time ago.

Q. And my question is, do the plaintiff's claims in this matter arise out of the operation of Bear River Equipment?

MR. REID: Well, the same objection to the extent you're asking her for a legal conclusion.

MR. CATHER: Sure.

Q. (BY MR. CATHER) Did you understand my question?

MR. REID: If you know.

THE WITNESS: Restate it for me.

Q. (BY MR. CATHER) Certainly.

Do the claims stated against you in the complaint, do they arise out of the operation of Bear River Equipment?

A. As far as I know.

Q. Okay. Now, as a point of clarification, I've been referring to the company as Bear River Equipment, Inc., and here it says Bear River Farm Equipment, Inc. Are these the same corporations?

A. They are. And the first one is

correct.

Q. There's no "farm" in it?

A. Hm-mmm.

Q. Okay. All right. Okay. Well, based on your understanding of the divorce decree and your stipulation that was entered prior, who is ultimately responsible for any debts and liabilities of Bear River Equipment?

A. Bill Shore.

Q. Okay. Now, Bobbie, I believe you indicated that there were never any shares issued; is that correct?

A. That's correct.

Q. Okay. So there were no steps taken to assign your shares to Bill then?

A. No.

Q. Okay. Were there any steps taken to remove you as an officer or director of Bear River Equipment?

A. That's a good question. And I was under the impression that Nick Bokides did that for me --

Q. Okay.

A. -- because I remember one time when I was in his office he'd went on the computer and

checked to be sure it was off.
Q. Okay.
A. And he said it was.
Q. Okay. But you're not aware of any corporate minutes, you don't believe?
A. No.
Q. Okay.
A. No.
Q. All right. When you said he went on his computer and checked, do you know what he was looking at?
A. I don't. I'm sorry.
Q. Okay. That's fine.
Do you recall when you provided copies of the guaranties that have been marked as Exhibits 1 and 2 to Mr. Bokides?
A. Not exactly.
Q. Okay. Can you give me an approximate time frame?
A. Approximately around -- I would say it was probably in around May of '06, when I was gathering all of the information together.
Q. Okay. Do you recall when you asked Mr. Bokides to write letters to Agricredit and McCormick?

A. That same time.
Q. Okay. Do you know if anything was done to release you as the guarantor?
A. Apparently not.
Q. Did you give Mr. Bokides a date to notify Agricredit and McCormick that you would no longer be a guarantor?
A. Only to be done in the course of the divorce, which would be when the divorce was final, in November of '06.
Q. Okay. Did Mr. Bokides indicate he would notify them?
A. Yes, he did.
Q. Okay. Did he say he would notify Agricredit and McCormick that you would no longer be a guarantor by a specific date?
A. He didn't tell me specifics of what he would say in the letter.
Q. Okay. Did he say when he would write the letter by?
A. He did not give me a date.
Q. Okay. Now, if I can just turn back to the divorce decree. It refers to a ranch property in Adams County, Idaho. Are you familiar with that property?

A. Yes.
Q. Okay. And I believe under the terms of the decree Bill Shore was supposed to sell that property and you were supposed to get $1.3 million for the sale of that property; is that correct?
A. That's correct.
Q. Okay. Has the property been sold?
A. No.
Q. Okay. Is it currently listed?
A. Yes.
Q. Okay. Do you know the market list price?
A. When -- when it was listed, which was '06 --
Q. Okay.
A. -- it was listed for I think it was like 6 and a half million.
Q. Okay.
A. But it's not worth a fraction of that now because of what the market has done.
Q. Okay. Do you know the current listing?
A. Actually, I don't.
Q. Okay. What is your current relationship with Bill Shore?

A. He's my divorced husband. What else --
Q. Do you have regular communication with him?
A. Quite often; yes.
Q. Okay. Have you discussed this lawsuit with him?
A. Yes.
Q. Okay. What has been the nature of those discussions?
A. Just making him aware of it. When we had been in Mr. Reid's office --
Q. Okay.
A. -- we discussed it, and so he was there when we discussed it.
Q. Okay. Now, I'm not asking for anything that you discussed in front of Mr. Reid, but has Bill Shore indicated anything about liability?
A. Not specifically; no.
Q. Okay. Have you discussed his liability pursuant to the divorce decree?
A. Yes, but not particularly because of this [indicating].
Q. I'm sorry. I don't --
A. Well, we have discussed that he's liable for all of Bear River's indebtedness.

Q. Okay. Have you discussed whether he's liable for any claims against you pursuant to this complaint?
A. Well, this complaint involves me and Mr. Bokides, not Bill Shore.
Q. I'm sorry. I'm referring to the actual complaint that was filed by McCormick.
A. Oh, yes.
Q. Okay.
A. Okay. So you're trying to get me to say that --
Q. No, I'm not trying to get you to say anything. My question is, have you discussed with Bill whether he is liable for McCormick's claims against you?
A. Yes.
Q. And what have those discussions been?
A. Just that that's the way it is, that he is liable for it.
Q. Okay.
A. That's what you want.
Q. Okay. I next want to hand you what's been marked as Exhibit No. 4. This is an agreement to indemnify. Are you familiar with that document?

A. Yes, sir.
Q. Who drafted that?
A. Nick Bokides.
Q. Okay. Why was that agreement drafted?
A. This was drafted because of the Petersen case.
Q. Okay.
A. Which was com- -- if I remember right, was coming to trial. We were already divorced.
Q. Okay.
A. And Mr. Bokides wrote this to try to protect me from anything in the Petersen case.
Q. Okay.
A. It doesn't have anything to do with McCormick.
Q. Okay. Can you turn to page 2? Now, who signed this agreement?
A. Bill Shore and Roberta Shore.
Q. Okay. And those are both your signatures?
A. Yes.
Q. Okay. I want to go back to the first paragraph on page 1. Can you read out loud in that first section, it's the second sentence. It's kind of long, but it begins with "The decree

of divorce." It's about halfway down that paragraph.
A. Oh, okay. "The decree of divorce further provided that Bill would indemnify and hold Bobbie harmless from all indebtedness related to the closely-held corporation Bear River ... Equipment, Incorporated, including, but not limited to, any claims or litigation against the parties arising out of the business operation operated by Bear River Farm Equipment, Incorporated, including attorney's fees and costs."
Q. Okay. Again, I'm going to ask you, what is your understanding of that paragraph? I'm not asking for a legal conclusion, but just your understanding. What does that sentence mean?
A. It means to me that he put that in there because there was a connection between Bear River Equipment and Rodney Petersen. It was prepared for the Petersen case.
Q. Okay. It says that -- and I'm just going to read parts, and if you can just tell me what your understanding is of this, what I read. It says, "The decree of divorce further provided

that Bill would indemnify and hold Bobbie harmless from all indebtedness related to the closely-held corporation Bear River ... Equipment, Inc. ..."
A. That sounds like the same sentence from the divorce decree, which was already done.
Q. Okay. And so what does that mean to you?
A. Just what it says.
Q. Okay. And what's that? I'm sorry. I know I'm going to ask repeating questions, but I just need your understanding.
A. Well, when it's in a -- in a document that has nothing to do with McCormick, I don't know -- understand why you care.
My understanding is it was put in there because there was a tie between Bear River Equipment and Petersen, and Nick Bokides was wanting to be sure to cover that along with the Petersen.
Q. Okay. And I understand that. But in that part of that sentence that I read, I didn't read anything in there that said anything about Mr. Petersen, so can you just -- what is your understanding of that sentence?

A. It says that Bill Shore is responsible for Bear River Equipment indebtedness.

Q. Okay. And now I'm going to go on. It says, "... including, but not limited to, any claims or litigation against the parties arising out of the business operation ..." What is your understanding of that?

A. That it means anything having to do with Bear River Equipment.

Q. All right. So is it your understanding that this is saying any litigation against you arising out of Bear River is the responsibility --

A. Of Bill Shore; yes.

Q. Okay. Now, you've indicated, and as we're read, the language in this is very similar to your divorce decree. Why was there a need to clarify and implement the divorce decree?

A. I don't understand what you're getting at.

Q. Okay. And maybe that's a better question for Mr. Bokides, but --

Okay. I'm going to refer back to your guaranties and to the operation of Bear River Equipment. What steps did you take to ensure

that the amounts you guarantee were timely paid?

A. Bill took care of it while we were together.

Q. Okay.

A. And when we separated, everything was fine. Bill was in contact with this Tom Lewis every week, and what I heard was things were going along good, they were selling a lot of equipment, and they were.

Q. Okay.

A. And that's the way it was up to the time that we separated.

Q. Okay. So do I understand you, yourself, took no steps to make sure that they were being paid; is that correct?

A. No. That was Bill's responsibility.

Q. And your assessment that everything was fine --

A. Yes.

Q. -- comes from Mr. Lewis' representations to Bill?

A. Yes.

Q. Okay.

A. And Bill's to me.

Q. Okay. Certainly.

Now back to what you've indicated is your instructions to have Mr. Bokides notify Agricredit and McCormick that you were unwilling to guarantee any further advances, loans. Did you ever follow up with Mr. Bokides about whether he did that?

A. No.

Q. Okay. And I believe you stated in your answers to interrogatories the first time you knew that he didn't do it is when you received the complaint; is that correct?

A. When -- not the complaint. When I received the demand letter.

Q. The demand letter; okay.

Now, you have filed a claim against Mr. Bokides requesting that he indemnify you and hold you harmless from any judgments obtained by the plaintiff; is that correct?

A. Yes.

Q. Okay. What are your damages in this case?

A. So far, $15,000 that I have paid in attorney fees to Mr. Reid.

Q. Okay. Are there any other damages?

MR. REID: You mean other than the

indemnification?

THE WITNESS: Other than time, stress, no.

Q. (BY MR. CATHER) Okay. Now, you have filed this claim against Mr. Bokides to indemnify you and hold you harmless. Why haven't you filed a claim against Bill Shore to indemnify you and hold you harmless?

A. Because that would do no good in stopping McCormick from coming after me as Mr. Bokides explained to me when I went in to see him when I received the demand letter. And he said it doesn't matter what the divorce decree says because that's between Bill and me. It has nothing to do with any other company. And they can come after me because of that guaranty that I didn't get off of.

Q. Okay. So if this is correct, my understanding is that you did not file against Bill because it would not stop McCormick from suing you?

A. Yes.

Q. Okay. So I guess my same question then would be, based on that, how is filing against Mr. Bokides going to stop McCormick from coming

after you?
A. I did not want to do this. It was the last thing I wanted to do. I waited as long as Mr. Reid thought we could because Bill was trying to settle it. Bill had been able to settle five or six other suits of this nature up to this point, but in doing so exhausted all his assets. McCormick's, this particular one just happened to be the last one.
Q. Okay.
A. And Bill negotiated with McCormick for I don't know how long. And when they could not come together, Mr. Reid advised me that in order to protect me that we should have to do it now.
Q. Okay.
A. And so that's why I did.
Q. Okay. Now, have you understood all the questions that I've asked?
A. Yes.
Q. Okay. Did you answer those questions truthfully?
A. I did.
Q. Okay.
MR. CATHER: I don't have any further questions. So Steve or --

MR. FULLER: I have a few, if I'm allowed. And I'll come over there.
MR. REID: How long are you going to be?
MR. FULLER: Very short.
MR. REID: Oh, okay. I was going to say we can take a break, but if you're not going to be very long, we might as well just forge ahead.

EXAMINATION
QUESTIONS BY MR. FULLER:

Q. Ms. Shore, my name is Steve Fuller. I'm an attorney from Preston, Idaho, and I represent McCormick International in this matter. I think you're already aware of that; is that correct?
A. I am.
Q. I do have a few questions for you based upon what has been asked so far. You indicated you have had some banking experience, approximately 27 years; is that correct?
A. I think that's -- I said 20-some years, and I think he wrote it as 27.
Q. Twenty-some years?
A. Yeah, that's what I said.

Q. In your work as a trust department officer and your other experience with the bank, are you familiar with guaranties -- did you become familiar with guaranties?
A. Not really.
Q. Do you know what a guaranty is --
A. Yes.
Q. -- basically?
A. Yes.
Q. And if a person makes a personal guarantee to guarantee the obligation of another person, do you understand what that is?
A. I do.
Q. Is that what you did in this particular case with regards to the obligations of Bear River Equipment to Agricredit?
A. I did.
Q. And also to McCormick?
A. Yes.
Q. Are you familiar with Mr. Tom Lewis?
A. Yes.
Q. Have you met him?
A. Yes.
Q. How many times do you think?
A. Too many to count. More than I would

like.
Q. So when your husband at that time, Mr. Shore, Bill Shore, would go to visit Preston and the Bear River Equipment site, would you go with him normally?
A. I did occasionally, but not every time.
Q. But there were more than ten, say, times that you visited with Mr. Lewis?
A. Counting the times he came up to the ranch, probably. I did not visit Preston that many times. We're only talking about one year.
Q. So there were occasions when he came to the ranch, and is it Council --
A. Council; yes.
Q. -- Idaho? Okay.
Were you present during most of those discussions with Mr. Lewis and Mr. Shore?
A. Just some of them.
Q. Okay. And what generally were they talking about when you were present?
A. I was present during some of the first ones when they were talking about organizing the company. I believe I was present when they were discussing some of the Petersen things.
Q. Were you aware that Mr. Lewis had

already been working there at the site for another company?
A. I was aware of that; yes.
Q. That site I'm referring to is in Preston.
A. Right.
Q. When you visited the site of Bear River Equipment in Preston, Idaho, did you ever have the occasion to look at the books or the records of the company?
A. No.
Q. Did Mr. Shore ever show you the books or records of the company?
A. No.
Q. Did you ever ask to see those books or records?
A. Yes.
Q. Okay. And tell me the results of your request.
A. When -- as I mentioned, I did not want to get involved with this. I didn't think we should be involved in it. And when he did anyway, I asked Bill to -- well, I told him that I thought we should have copies of the statements sent to us every month so we could keep track of

the financial. And my bookkeeping background, I knew how important that was. Bill would not do it.
A time or two I talked to Tom Lewis myself asking him particular questions and -- and didn't get anywhere. If you know Tom, you know why. Until Bill would get so mad at me that I -- I quit. I didn't want to get into this, but that's basically the reason.
I -- I threw fits. I screamed and yelled. Oh, not at him, but because of the situation, that I finally had to quit. And I saw that I was not going to get to oversee what I wanted to oversee, so I quit.
Q. What questions or concerns did you have? You must have had some if you were that upset about it.
A. First of all, I didn't like Tom Lewis. That's why I didn't want to do this to start with. But secondly was basically only it made common sense to oversee our investment closer than he was willing to do.
Q. Did you have any specific concerns, meaning did you know about any specific items or practices that were being conducted by Bear River

Equipment that you did not agree with?
A. I did not. I had no -- no reason to think there would be anything wrong. I just am used to being more of a detailed person in -- in bookkeeping and we invested this money in that, and I thought we should -- and we were owners. I thought we should keep track of it.
Q. In your previous testimony today you have referred to two guaranties, one to McCormick and one to Agricredit. I believe those are Exhibits 1 --
A. And 2.
Q. -- and 2. At the time you executed -- well, let me ask you, you did execute those documents?
A. I did.
Q. That is your signature?
A. Yes.
Q. Was that your free and voluntary act?
A. (Laughter).
Q. Did anyone force you to sign those?
A. I would have to say no.
Q. Okay. So was it your free and voluntary act?
A. Yes.

Q. Okay. And did you understand what you were doing at the time?
A. Yes.
Q. Okay. After you signed those guaranties and the other documents that you referred to in your previous testimony, did you continue to raise questions with regards to the management or bookkeeping of Bear River Equipment?
A. No.
Q. I believe you indicated that you told Mr. Bokides in May of 2006 that you wished him to give notice to Agricredit and McCormick that you no longer wished to be held to the personal guaranties that you had signed; is that correct?
A. That's correct, although I'm not positive about the date. It was about -- around there.
Q. Is that when you first went to see him?
A. No. I first went to see him March 1st, but by the time things had calm- -- had calmed down some and -- and I started -- was able to get -- start getting things gathered up and figured out would have been about then.
Q. So you believe then in approximately

May of 2006 you had copies of those guaranties and you gave those to Mr. Bokides?

A. Yes.

Q. And that's when you asked him to write the letter or give notice?

A. I asked him to write letters.

Q. Is it your contention that anything that was sold after May of 2006 by McCormick to Bear River Equipment under that personal guaranty, is it your contention that you would not be obligated to pay those had Mr. Bokides written the letter the way he was supposed to?

A. Yes.

Q. Do you know when it was first discovered that equipment had been sold without paying Agricredit by Bear River Equipment? Do you know when that happened?

A. The first I knew of it was August of '07 when I got that demand letter.

Q. You received a letter at that point in time?

A. Yes, I did.

Q. Had Mr. Shore talked to you about this at all prior to that time?

A. No.

Q. What did you do when you received the demand letter dated August 30, 2007? I believe that's the date.

A. Picked up the phone and called Nick Bokides.

Q. Okay. And what was said?

A. I believe I made arrangements to go into his office and then -- so I could show him the letter. And that is when he explained to me that he didn't send them, and I was shocked, surprised.

Q. Are you familiar with the term "sold out of trust"?

A. I am.

Q. What is your understanding of that term?

A. That the company sells a tractor to a customer that they have on the floor and receives the money from the customer, but does not pay for the tractor.

Q. Do you understand from the complaint that was filed by McCormick that that is part of the basis for that complaint, that items were sold out of trust by Bear River Equipment?

A. I do.

Q. Did you ever confront Mr. Lewis with regards to any of these problems?

A. No. This came up a year after the divorce was final. I didn't have anything to do with him.

Q. Since your divorce, have you ever spoken to Mr. Lewis?

A. No.

Q. You indicated that the ranch property in --

A. Council.

Q. -- Council was originally listed at 6.5 million, but you weren't aware of the current listing?

A. That is because this listing had run out and I had discussed with Bill about relisting it and about lowering the price, and we talked -- we discussed it, but whether he got back with the Realtor or not, I'm -- at this point I don't know.

Q. Were there any other listings that you're aware of for different amounts than the 6.5 million?

A. Before he listed it with this company, which is the Knipe Company, he had it listed with

another company.

Q. Do you believe that it is currently listed for sale?

A. I don't know whether he has relisted it or not because it just came -- it just expired within the last month or so.

Q. You mean the old listing for 6.5 million?

A. Yes. Yes.

Q. Aren't you supposed to receive was it 1.3 million from that sale?

A. Yes.

Q. Do you know if any offers have been made?

A. Not in a while.

Q. What was the last offer, if you know?

A. It was when it was listed with a different company, the first company. And some people from back east were interested, and there was a big deal about it, and they came out so many times. Whether there was a written offer, I really don't know, but it was for 5 million something they were talking then.

Q. How long ago was that?

A. Oh, this would have been in '07.

1 MR. FULLER: I don't have any other
2 questions.
3 MR. REID: We want to read and sign.
4 (Deposition concluded at 12:08 P.M.)
5 (Signature requested.)
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EXHIBIT B

RESPONSE NO. 3: Roberta Shore did not deliver letters as originally indicated but delivered copies of the guaranties she executed. The guaranties provided by Roberta Shore are produced on the enclosed disc.

REQUEST FOR ADMISSION

REQUEST FOR ADMISSION NO. 1: Please admit that during the course of your representation of Roberta Shore in her divorce proceeding, you were directed to notify Agri-Credit corporation that she would not act as a guarantor for debts Of Bear River Equipment Co. as of November 16, 2006.

RESPONSE NO. 1: Third Party Defendant admits that Roberta Shore requested that he notify certain creditors to make no further advances to Bear River pursuant to Roberta Shore's personal guaranties.

REQUEST FOR ADMISSION NO. 2: Please admit that you failed to notify Agri-Credit corporation of Roberta Shore's decision to cease being a guarantor for debts of Bear River Equipment from and after November 16,2006.

RESPONSE NO. 2: Third Party Defendant admits that he did not notify Agri-Credit Corporation to make no further advances to Bear River pursuant to Roberta Shore's personal guaranty.

REQUEST FOR ADMISSION NO. 3: Please admit that your failure to notify Agri-credit of Roberta Shore's decision to no longer act as a guarantor for debts of Bear River Equipment was negligent.

RESPONSE NO. 3: Third Party Defendant objects on the basis that the request calls for a legal conclusion.

FILED

10 MAY 26 PM 3:52

FRANKLIN COUNTY CLERK

ORIGINAL Hampton

DEPUTY

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Attorneys for Defendants

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF FRANKLIN

MCCORMICK INTERNATIONAL USA, INC., a corporation Plaintiff, vs. BEAR RIVER EQUIPMENT, INC., a corporation, WILLIAM R. SHORE an individual; and ROBERTA SHORE, an individual, Defendants.	* * *)	Case No. CV 08-327 NOTICE OF HEARING
ROBERTA SHORE, an individual, Third-Party Plaintiff, vs.	)	

NICHOLAS BOKIDES, an individual,

Third-Party Defendant.

PLEASE TAKE NOTICE that on June 24, 2010 at 4:00 p.m. of said day, or as soon thereafter as counsel can be heard, the undersigned will call up for hearing her Motion for Summary Judgment at the Bannock County Courthouse, 624 E. Center Street, Pocatello, Idaho.

DATED this 26th day of May, 2010.

RINGERT LAW CHARTERED

By _____
James G. Reid

CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of May, 2010, a true and correct copy of the foregoing was served upon all parties listed below by:

(✓) U. S. mail, postage prepaid
( ) hand delivery
( ) express mail
(x) facsimile

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FILED
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FRANK [illegible] CLERK
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K Jones
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IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF FRANKLIN

MCCORMICK INTERNATIONAL USA, INC., a corporation Plaintiff, vs. BEAR RIVER EQUIPMENT, INC., a corporation, WILLIAM R. SHORE an individual; and ROBERTA SHORE, an individual, Defendants.	* * *)	Case No. CV 08-327 NOTICE OF NON-OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT
ROBERTA SHORE, an individual, Third-Party Plaintiff, vs.	)	

NICHOLAS BOKIDES, an individual,)
)
Third-Party Defendant.)
*
*
*

COMES NOW, the Defendants, by and through counsel of record, and hereby gives notice that Defendants do not oppose Plaintiff's Motion for Summary Judgment presently pending for hearing on June 21, 2010.

DATED this 4th day of June, 2010.

RINGERT LAW CHARTERED

By _____
James G. Reid

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of June, 2010, a true and correct copy of the foregoing was served upon all parties listed below by:

(✓) U. S. mail, postage prepaid
( ) hand delivery
( ) express mail
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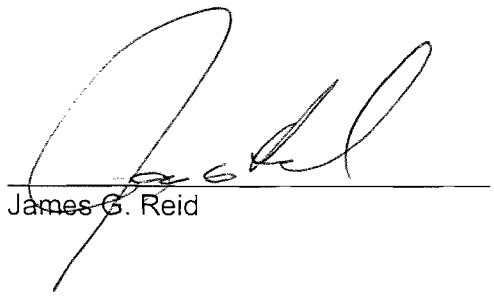

James G. Reid

FILED

10 JUN 11 PM 12:06

FRANKLIN COUNTY CLERK

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Attorneys for Nicholas Bokides, Third-Party Defendant

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF FRANKLIN

McCORMICK INTERNATIONAL USA, INC., a corporation, Plaintiff, vs. BEAR RIVER EQUIPMENT, INC., a corporation; WILLIAM R. SHORE, an individual; and ROBERTA SHORE, an individual, Defendants. ROBERTA SHORE, an individual, Third-Party Plaintiff, vs. NICHOLAS BOKIDES, an individual, Third-Party Defendant.	Case No. CV 08-327 **NICHOLAS BOKIDES' MEMORANDUM IN OPPOSITION TO THIRD-PARTY PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

COMES NOW the Third-Party Defendant, Nicholas Bokides, by and through undersigned counsel, and hereby submits this *Memorandum in Opposition to Third-Party Plaintiff's Motion for Summary Judgment* against Third-Party Defendant, Nicholas Bokides.

I. INTRODUCTION

The parties each agree that: 1) Roberta Shore personally guarantied the obligations of Bear River Equipment, Inc. ("Bear River") to Agri-Credit Corporation ("Agri-Credit") and McCormick International USA, Inc. ("McCormick'); 2) Nicholas Bokides ("Bokides") represented Roberta Shore in divorce proceedings against William Shore; 3) Bokides agreed to notify Agri-Credit and McCormick in writing that Roberta Shore would no longer be a guarantor for the obligations of Bear River; 4) Bokides failed to notify Agri-Credit as agreed; and 5) the obligations which form the gravamen of McCormick's claims against Roberta Shore were the obligations of Bear River.

However, there is a genuine issue as to when the parties agreed that Bokides would notify Agri-Credit and McCormick that Roberta Shore would no longer guaranty the obligations of Bear River. Additionally, at issue is the amount of liability arising from Bokides' failure to notify Agri-Credit and McCormick. These issues, as to the material facts of Roberta Shore's claims, preclude summary judgment in her favor. Finally, there remains the unresolved issue of Roberta Shore's failure to mitigate her damages.

II. STATEMENT OF MATERIAL FACTS

1. On or about March 22, 2005, Roberta Shore executed personal guaranties wherein she guarantied the obligations of Bear River in favor of McCormick and Agri-Credit ("Gaurantees"). *Affidavit of Kevin Peters in Support of Plaintiff's Motion for Summary*

Judgment ("Peters Aff.") , Exhibit L and *Affidavit of Jean Cosbey in Support of Plaintiff's Motion for Summary Judgment* ("Cosbey Aff.), Exhibit D.

2. Roberta Shore requested that Bokides notify Agri-Credit and McCormick in writing that Roberta Shore would no longer be a guarantor for the obligations of Bear River in or around May of 2006. *Affidavit of James G. Reid in Support of Motion for Summary Judgment* ("Reid Aff."), Exhibit A (Deposition of Roberta Shore taken January 5, 2010 ("Shore Depo."), p. 33, L. 14-22.

3. Bokides told Roberta Shore that because of community property and impairment of asset concerns he would not notify McCormick or Agri-Credit until her pending divorce was finalized. *Affidavit of Nicholas T. Bokides in Opposition to Third-Party Plaintiff's Motion for Summary Judgment* ("Bokides Aff."), ¶¶ 5-7.

4. After being informed of the community property issues, Roberta Shore agreed to wait to cancel the Guarantees until the divorce was finalized and the decree entered. Bokides Aff., ¶¶ 7-8.

5. The Decree of Divorce was entered by Magistrate Gregory F. Frates, Third Judicial District Court of the State of Idaho, County of Washington ("Decree of Divorce') on November 15, 2006 and filed the following day. A true and correct copy of the Decree of Divorce is attached as Exhibit "A" to the *Affidavit of Bradley J Williams in Support of Motion for Summary Judgment* ("Williams Aff.").

6. The Decree of Divorce provides that William Shore shall pay when due, and hold Roberta Shore harmless from, all indebtedness relating to Bear River, including all

claims or litigation against the parties. Decree of Divorce, P. 4, § VI, Shore Depo., p. 29, L. 12 to p. 30 L. 15, *See* Ex. "A," Reid Aff.

7. Roberta Shore called Bokides shortly after the Decree of Divorce was entered and requested that he notify McCormick and Agri-Credit in writing that she would no longer be a guarantor for the obligations of Bear River. Bokides Aff., ¶8.

8. There was no agreement or understanding between Roberta Shore and Bokides as to when Bokides was to write the letters terminating the Guarantees to Agri-Credit and McCormick. Shore Depo., p. 34, L. 14-21, *See* Ex. "A," Reid Aff.

9. . Although Bokides agreed to notify the creditors, he failed to provide notice to Agri-Credit and McCormick that Roberta Shore would no longer guaranty the obligations of Bear River. Bokides Aff., ¶9.

10. On or about August 31, 2006, two tractors (Model Nos. CX85 and MC115) were invoiced and delivered to Bear River. The total amount financed for the two tractors was $86,474.42. *Affidavit of C. Edward Cather in Opposition to Third-Party Plaintiff's Motion for Summary Judgment* ("Cather Aff.") filed concurrently herewith, Exhibit A (Deposition of Greg Briggs taken February 23, 2009 ("Briggs Depo."), Exhibits 5 and 7.

11. On or about December 19, 2006, two tractors (Model Nos. MTX135 and MTX120) and one loader (Model No. MCQLI45) were invoiced and delivered to Bear River. The total amount financed for these three pieces of equipment was $117,850.72. Briggs Depo., Exhibits 5 and 7, *See* Ex. "A," Cather Aff.

12. On or about December 27, 2006, one tractor (Model No. CX105) was invoiced and delivered to Bear River. The total amount financed for this tractor was $41,562.32. Briggs Depo., Exhibits 5 and 7, *See* Ex. "A," Cather Aff.

13. McCormick sued Roberta Shore based upon the Guarantees. Amended Answer, Third Party Complaint and Demand for Jury Trial ("Third Party Complaint"), p. 8, ¶ IX.

14. The obligations which form the gravamen of McCormick's claims against Roberta Shore were the obligations of Bear River. Third Party Complaint, p. 8, ¶ IX.

15. Pursuant to the Decree of Divorce, William Shore is solely liable for the claims asserted by McCormick against Roberta Shore. Shore Depo., p. 37, L. 12-19. *See* Ex. "A," Reid Aff. *William Shore's Answers to Interrogatories*, P. 9, ¶10 to P. 10, ¶1. *See* Ex. "C," Williams Aff.

16. Roberta Shore has not taken any action to enforce the provisions of the Decree of Divorce against William Shore, nor taken any other steps, such as bringing a cross-claim against William Shore. Shore Depo., p. 44, L. 4-22, *See* Ex. "A," Reid Aff.

III. STANDARD OF REVIEW

Summary judgment is proper only if the "pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law." I.R.C.P. 56(c). Regarding factual issues, this Court must liberally construe all facts in the record, and all inferences that may be reasonably drawn from such facts, in favor of the nonmoving party. *Regjovich v. First W. Inv., Inc.*, 134 Idaho 154, 158, 997 P.2d 615, 619 (2000).

If conflicting inferences can be drawn from the record, or if reasonable minds might reach different conclusions concerning a material issue in the case, summary judgment must be denied. *Regjovich*, 134 Idaho at 158, 997 P.2d at 619 (citing *Bonz v. Sudweeks*, 119 Idaho 539, 541, 808 P.2d 876, 878 (1991; *DBSI/TRI V v. Bender*, 130 Idaho 796, 802, 948 P.2d 151, 157 (1997). The courts must liberally construe facts in the existing record in favor of the nonmoving party, and draw all reasonable inferences from the record in favor of the nonmoving party. *Id.* Motions for summary judgment should be granted with caution. *Id.*. (citing *Bailey v. Ness*, 109 Idaho 495, 708 P.2d 900 (1985)).

Ultimately, the burden of proving the absence of a material factual dispute rests upon the moving party, and such burden is onerous because even circumstantial evidence can create a genuine issue of material fact. *Harris v. State, Dep't of Health & Welfare*, 123 Idaho 295, 298, 847 P.2d 1156, 1159 (1992); *McCoy v. Lyons*, 120 Idaho 765, 769, 820 P.2d 360, 364 (1991).

IV. ARGUMENT

Roberta Shore has asserted a claim of legal malpractice against Bokides, however, there are genuine issues as to: 1) when the parties agreed that Bokides would notify Agri-Credit and McCormick that Roberta Shore would no longer guaranty the obligations of Bear River; and 2) the amount of liability arising from Bokides' failure to notify Agri-Credit and McCormick. Roberta Shore has failed to present any expert evidence establishing the reasonable promptness required to notify the creditors. Additionally, Roberta Shore has failed to mitigate her damages, if any, by not seeking to enforce the terms of the Decree of Divroce against William Shore or file

a cross-claim against him, even though he alone is required to reimburse McCormick for any liabilities of Bear River.

A. Genuine Issues of Material Fact Exist Regarding When Bokides Agreed to Notify Agri-Credit and McCormick

Robert Shore has alleged that Bokides agreed in May of 2006 to notify Agri-Credit and McCormick in writing that she would no longer guarantee the obligations of Bear River and, "that there is no question but that this instruction was given to Mr. Bokides in the spring of 2006 ("May)." However in her deposition testimony, Robert Shore initially indicated that she did not recall exactly when she requested that Bokides notify Agri-Credit and McCormick in writing that she would no longer guarantee the obligations of Bear River. Shore Depo., p. 33, L. 14 to p. 34 L. 1, *See* Ex. "A," Reid Aff. Only later did she respond that she provided the guarantees to Bokides and requested that he notify the creditors "probably in around May of '06." *Id.*

While neither party recollects exactly when the Guarantees were first provided to Bokides, both parties agree that they were provided prior to the entrance of the Decree of Divorce. Notwithstanding, Bokides told Roberta Shore that he would not give notice to McCormick and Agri-Credit until after the divorce was finalized. Roberta Shore then called Bokides after the divorce was finalized and requested that he then notify the creditors. However, there was no agreement between the parties as to when Bokides would notify Bear River.

In the memorandum filed in support of her motion for summary judgment, Third-Party Plaintiff states "that the actual date of the sale of the equipment out of trust is not material ..." Although this statement is correct, it is correct for altogether different reasons that those cited by Third-Party Plaintiff. While the date the equipment was sold created a payment

obligation to satisfy the financed amount, Bear River's liability, and therefore Roberta Shore's liability, as the guarantor of Bear River's liabilities, was incurred the day the machinery was provided to and financed by Bear River. While Bear River was not required to pay the amount advanced prior to the sale of the machinery, pursuant to the Wholesale Financing Request and Agreements, the Security Agreement and the Retail Financing Agreement executed by Bear River, Bear River, and Roberta Shore as guarantor, was liable for the total amount financed upon delivery of the inventory. Cosbey Aff., Ex. C, Peters Aff., Exs. A – G.

The guaranty agreements executed by Roberta Shore provides that Roberta Shore unconditionally guarantied all credit amounts extended to Bear River until she terminated the Guarantees. Cosbey Aff., Ex. D, Peters Aff., Ex L.

On or about August 31, 2006, Bear River financed two tractors for $86,474.42. On December 19, 2006, little over a month after the Decree of Divorce was filed by the court, Bear River financed an additional three pieces of equipment for $117,850.72. On or about December 27, 2006, Bear River financed an additional tractor for $41,562.32. Of the total unpaid balanced of $262,636.43, $245,887.46 was financed by Bear River before or shortly after the Decree of Divorce was entered. Pursuant to the terms of the financing document, Bear River incurred the above liabilities, and a duty to satisfy these obligations, when the machinery was financed.

Roberta Shore has alleged that she requested that Bokides notify her creditors in May 2006. She also indicated that he was to notify the creditors in the course of representing her. Even prior to considering the testimony of Bokides, Roberta Shore would likely be liable for the $86,474.42, the amount financed prior to the execution of the Decree of Divorce.

However, after considering Bokides' testimony that there was no agreement to notify the creditors until after the divorce was finalized, Roberta Shore is at a minimum liable for the $86,474.42 financed prior to the Shores' divorce. Therefore, there can be no argument that Roberts Shore has a claim against Bokides for the $86,474.42, plus interest and other fees.

The pertinent issues to be resolved are 1) when did Bokides agree to notify Agri-Credit and McCormick that Roberta Shore would no longer guaranty the obligations of Bear River and 2) what was a reasonable time in which to notify Agri-Credit and McCormick. There is a genuine issue of fact as to what constitutes a reasonable amount of time with respect to equipment financed in August of 2007 may not be subject to her Guarantees, what about equipment financed a little over a month after the divorce was finalized. Roberta Shore has not provided any evidence as to when, after the Decree of Divorce was entered, she contacted Bokides and Bokides agreed to notify McCormick and Agri-Credit. While an attorney has a duty to follow his client's instructions with reasonable promptness and care, Third-Party Plaintiff has not presented any expert evidence, as required by Idaho law, to establish what would constitute the reasonable promptness and care required of Bokides after he agreed to notify the creditors. *See Samuel v. Hepworth, Nungester and Lezamiz*, 134 Idaho 84, 89 (2000).

B. Roberta Shore's Claims for Attorney Fees is Without Merits

Roberta Shore contends that, but for Bokides' alleged negligence, she would not have been a party to McCormick's claims. This contention is speculative and is not supported by any evidence or legal authority. It is clear that McCormick would have had a valid claim against Roberta Shore whether or not Bokides gave notice to McCormick and Agri-Credit after the Decree of Divorce was entered. As set forth above, pursuant to the terms of the Guarantees

executed by Roberta Shore and the financing documents executed by Bear River, $86,474.42 of the liability McCormick claims it is owed was financed prior to the date of divorce. Therefore, at a minimum, McCormick would have had a valid claim for this amount whether or not Bokides gave notice to McCormick and Agri-Credit.

C. Summary Judgment Against Bokides is Inappropriate as Roberta Shore Has Failed to Mitigate Her Damages

"The duty to mitigate, also known as the 'doctrine of avoidable consequences,' provides that a plaintiff who is injured by actionable conduct of a defendant is ordinarily denied recovery for damages which could have been avoided by reasonable acts...." *U.S. Bank National Ass'n v. Kuenzli,* 134 Idaho 222, 228, 999 P.2d 877, 883 (2000) *quoting Margaret H. Wayne Trust v. Lipsky,* 123 Idaho 253, 261, 846 P.2d 904, 912 (1993)). Such a policy prevents "persons against whom wrongs have been committed from passively suffering economic loss which could be averted by reasonable efforts." *Industrial Leasing Corp. v. Thomason*, 96 Idaho 574, 577, 532 P.2d 918, 919 (1974) *quoting Wright v. Baumann*, 239 Or. 410, 398 P.2d 119 (1965).

The duty to mitigate also applies in legal malpractice disputes. "If an attorney's negligent conduct in representing a client leaves the client with an alternative remedy or remedies which are both viable and equivalent, the result may be that the client suffers no loss or a reduced loss as the proximate cause of the attorney's negligent conduct." *O'Neil v. Vasseur*, 118 Idaho 257, 262, 796 P.2d 134, 139 quoting *Swanson v. Sheppard,* 445 N.W.2d 654, 658 (N.D.1989).

Here, Roberta Shore has a duty to mitigate any damages she has suffered, or may potentially suffer, from Bokides' alleged negligence in failing to give McCormick and Agri-Credit notice that she would no longer guarantee the debts of Bear River. The Decree of Divorce

provides that William Shore shall pay when due, and hold Roberta Shore harmless from, all indebtedness relating to Bear River, including all claims or litigation against the parties. Accordingly, William Shore is liable for the total amount of McCormick's claims as set forth in the Complaint. The satisfaction of McCormick's claims by William Shore will mean that Roberta Shore will not suffer any damages.

Notwithstanding William Shore's absolute and admitted liability, Roberta Shore has not sought to enforce the provisions of the Decree of Divorce against William Shore, nor taken any other steps to ensure that William Shore indemnifies her, such as filing a cross-claim against him. Rather, she has only sought to pass on any potential damages she may sustain to Bokides. As demonstrated by the foregoing cases, Roberta Shore has a clear duty to mitigate her damages by seeking enforcement of the Decree of Divorce against William Shore.

Roberta Shore's unwillingness to take action against William Shore is an attempt to have Bokides bear the total liability for the amounts advanced to Bear River while allowing William Shore to escape liability pursuant to the guaranties and the Decree of Divorce . In essence, Roberta Shore is passively allowing the party primarily liable for the debt to avoid any responsibility by trying to place the blame on Bokides who is, at best, secondarily liable.

V. CONCLUSION

For the foregoing reasons, Third-Party Plaintiffs' Motion for Summary Judgment should be denied.

DATED this 10th day of June, 2010.

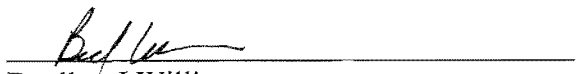
MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED

By _____
Bradley J Williams – Of the Firm
Attorneys for Nicholas Bokides

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of March, 2010, I caused a true and correct copy of the foregoing **NICHOLAS BOKIDES' MEMORANDUM IN OPPOSITION TO THIRD-PARTY PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT** to be served by the method indicated below, and addressed to the following:

Steven R. Fuller STEVEN R. FULLER LAW OFFICE 24 North State P.O. Box 191 Preston, ID 83262 *Attorney for Plaintiff*	(X) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail (X) Facsimile
James G. Reid Laura E. Burri RINGERT LAW CHARTERED 455 S. Third P.O. Box 2773 Boise, ID 83701-2773 Facsimile: (208) 342-4657 *Attorneys for Defendants and Third-Party Plaintiff Roberta Shore*	( ) U.S. Mail, Postage Prepaid ( ) Hand Delivered (X) Overnight Mail (X) Facsimile
Honorable Mitchell W. Brown District Judge 159 South Main Soda Springs, ID 83276 *Chambers Copy*	( ) U.S. Mail, Postage Prepaid ( ) Hand Delivered (X) Overnight Mail ( ) Facsimile



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Attorneys for Nicholas Bokides

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF FRANKLIN

McCORMICK INTERNATIONAL USA, INC., a corporation,

Plaintiff,

vs.

BEAR RIVER EQUIPMENT, INC., a corporation; WILLIAM R. SHORE, an individual; and ROBERTA SHORE, an individual,

Defendants.

ROBERTA SHORE, an individual,

Third-Party Plaintiff,

vs.

NICHOLAS BOKIDES, an individual,

Third-Party Defendant.

Case No. CV 08-327

AFFIDAVIT OF NICHOLAS T. BOKIDES IN OPPOSITION TO THIRD-PARTY PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

STATE OF IDAHO)
: ss.
County of Washington)

NICHOLAS T. BOKIDES, being first duly sworn upon oath, deposes and states as follows:

1. My name is Nicholas T. Bokides, and I am over the age of eighteen (18) years. The matters contained in this affidavit are based upon my personal knowledge and beliefs.

2. I represented Roberta Shore in her divorce from her then husband, William R. Shore. The divorce action, Shore v. Shore, Third Judicial District, State of Idaho, County of Washington, Case CV 2006-365, was filed March 6, 2006.

3. The complaint alleged that Ms. Shore should receive spousal support and an unequal division of community property. At the time of the filing of the action, I was not aware of any guarantee by Roberta of debts of Bear River and the complaint did not contain any specific details of the parties' property or debt.

4. I was not instructed, prior to entry of the decree of divorce, to prepare deeds or documents to convey Roberta's interest in Bear River to Bill Shore. Although all negotiations assumed Bill Shore would receive this asset, I was not requested to, nor do I recall any discussions that we would, transfer these assets without consideration, or otherwise transmute the assets into separate property owned by Bill Shore.

5. I do recall at least one discussion with Roberta, pre-divorce, regarding community debts in general and the debts of Bear River, including her guarantees. There may have been more than one discussion. During the discussion I recall, I advised Roberta that all debts incurred up to the point that a decree of divorce is entered are community debts and that

until the decree was entered, I would not take action to cancel her guarantees. In addition, I informed her that the canceling of a guarantee pre-divorce would be of limited use because the community property of both parties is liable for community debts.

6. In addition, I would be concerned about how such a cancellation might affect the business, and if it could impair the business value or cause a creditor to withdraw credit, thereby damaging the business. My concern would be that a court could hold Roberta responsible for damaging the business in those circumstances. Although I do not believe I discussed this legal issue with Roberta, spouses do, up to the point of divorce, have a fiduciary duty to each other, and I would want to give careful thought to taking any action that might impair the ability of the other spouse to operate its business, prior to entry of a decree.

7. My recollection is that Roberta was satisfied with my explanation of the community nature of these debts, and agreed to wait until the decree was entered to deal with her concerns about her guarantee of the Bear River debts. I do not recall any resistance from Roberta to this advice.

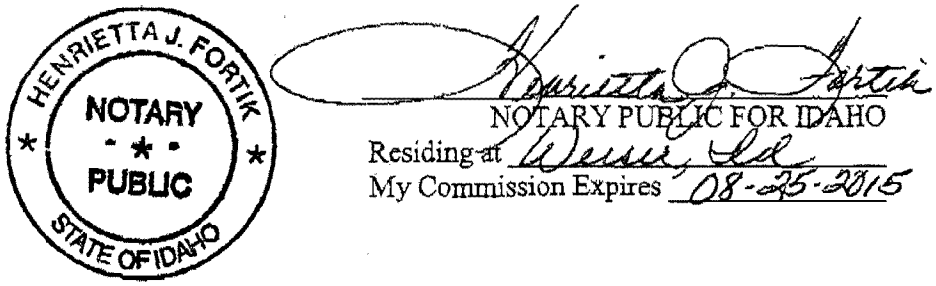
8. My recollection is it was shortly after the decree was entered that Roberta contacted me and asked that I write letters canceling her guarantee of Bear River debts and I then did agree to do so.

9. However, I neglected to write the requested termination letter.

Further your affiant sayeth naught.

Nicholas T. Bokides

SUBSCRIBED AND SWORN to before me this 9th day of June, 2010.



NOTARY PUBLIC FOR IDAHO
Residing at Weiser, Id
My Commission Expires 08-25-2015

AFFIDAVIT OF NICHOLAS T. BOKIDES IN OPPOSITION TO THIRD-PARTY PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

DATED this 10th day of June, 2010.

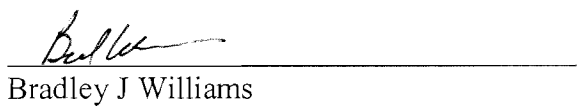
MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED

By _____
Bradley J Williams – Of the Firm
Attorneys for Nicholas Bokides

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of June, 2010, I caused a true and correct copy of the foregoing **AFFIDAVIT OF NICHOLAS T. BOKIDES IN OPPOSITION TO THIRD-PARTY PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT** to be served by the method indicated below, and addressed to the following:

Steven R. Fuller STEVEN R. FULLER LAW OFFICE 24 North State P.O. Box 191 Preston, ID 83262 *Attorney for Plaintiff*	(X) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail (X) Facsimile
James G. Reid Laura E. Burri RINGERT LAW CHARTERED 455 S. Third P.O. Box 2773 Boise, ID 83701-2773 Facsimile: (208) 342-4657 *Attorneys for Defendants and Third-Party Plaintiff Roberta Shore*	( ) U.S. Mail, Postage Prepaid ( ) Hand Delivered (X) Overnight Mail (X) Facsimile
Honorable Mitchell W. Brown District Judge 159 South Main Soda Springs, ID 83276 *Chambers Copy*	( ) U.S. Mail, Postage Prepaid ( ) Hand Delivered (X) Overnight Mail ( ) Facsimile



Bradley J Williams

Bradley J Williams, ISB No. 4019
Charles Edward Cather III, ISB No. 6297
MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED
420 Memorial Drive
Post Office Box 51505
Idaho Falls, Idaho 83405
Telephone (208) 522-6700
Facsimile (208) 522-5111
bjw@moffatt.com
cec@moffatt.com
17136.0349

Attorneys for Nicholas Bokides

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF FRANKLIN

McCORMICK INTERNATIONAL USA, INC., a corporation, Plaintiff, vs. BEAR RIVER EQUIPMENT, INC., a corporation; WILLIAM R. SHORE, an individual; and ROBERTA SHORE, an individual, Defendants.	Case No. CV 08-327 **AFFIDAVIT OF C. EDWARD CATHER IN OPPOSITION TO THIRD-PARTY PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

ROBERTA SHORE, an individual,

Third-Party Plaintiff,

vs.

NICHOLAS BOKIDES, an individual

Third-Party Defendant,

STATE OF IDAHO)
) ss.
County of Bonneville)

C. Edward Cather, being first duly sworn upon oath, deposes and states as follows:

1. I am one of the attorneys for Third-Party Defendant, Nicholas Bokides in the above-referenced matter and, as such, have personal knowledge with respect to the matters herein.

2. Attached hereto as Exhibit "A" is a true and correct copy of the Deposition of Greg Briggs taken in this action on February 23, 2009.

C. Edward Cather

SUBSCRIBED AND SWORN to before me this 10th day of June, 2010.

NOTARY PUBLIC FOR IDAHO
Residing at Idaho Falls.
My Commission Expires 4/9/14

DATED this 10th day of June, 2010.

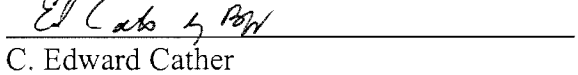
MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED

By
Bradley J Williams – Of the Firm
Attorneys for Nicholas Bokides

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of March, 2010, I caused a true and correct copy of the foregoing **AFFIDAVIT OF C. EDWARD CATHER IN OPPOSITION TO THIRD-PARTY PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT** to be served by the method indicated below, and addressed to the following:

Steven R. Fuller STEVEN R. FULLER LAW OFFICE 24 North State P.O. Box 191 Preston, ID 83262 *Attorney for Plaintiff*	(X) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail (X) Facsimile
James G. Reid Laura E. Burri RINGERT LAW CHARTERED 455 S. Third P.O. Box 2773 Boise, ID 83701-2773 Facsimile: (208) 342-4657 *Attorneys for Defendants and Third-Party Plaintiff Roberta Shore*	( ) U.S. Mail, Postage Prepaid ( ) Hand Delivered (X) Overnight Mail (X) Facsimile
Honorable Mitchell W. Brown District Judge 159 South Main Soda Springs, ID 83276 *Chambers Copy*	( ) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail (X) Facsimile



C. Edward Cather

EXHIBIT "A"

IN THE SIXTH JUDICIAL DISTRICT COURT

IN AND FOR FRANKLIN COUNTY, STATE OF IDAHO

* * *

McCORMICK INTERNATIONAL USA, INC., a corporation,	
Plaintiff,	CIVIL NO. CV-08-327
vs.	DEPOSITION OF:
BEAR RIVER EQUIPMENT, INC., a corporation, WILLIAM R. SHORE, an individual, and ROBERTA SHORE, an individual,	***GREG BRIGGS***
Defendants.	

* * *

February 23, 2009
9:32 a.m.

Offices of Steven R. Fuller
24 North State
Preston, Idaho

* * *

RENEE L. STACY
Registered Professional Reporter

IN THE SIXTH JUDICIAL DISTRICT COURT

IN AND FOR FRANKLIN COUNTY, STATE OF IDAHO

* * *

McCORMICK INTERNATIONAL USA, INC., a corporation,	)
Plaintiff,	) CIVIL NO. CV 08 327
vs.	) DEPOSITION OF:
BEAR RIVER EQUIPMENT, INC., a corporation, WILLIAM R. SHORE, an individual, and ROBERTA SHORE, an individual,	) GREG BRIGGS
Defendants.	)

* * *

February 23, 2009
9:32 a.m.

Offices of Steven R. Fuller
24 North State
Preston, Idaho

* * *

RENEE L. STACY
Registered Professional Reporter

I N D E X

E X H I B I T S

A P P E A R A N C E S

FOR THE PLAINTIFF: STEVEN R. FULLER
Attorney at Law
STEVEN R. FULLER LAW OFFICE
24 North State
P.O. Box 191
Preston, ID 83262
(208) 852-2680

FOR THE DEFENDANTS: JAMES G. REID
Attorney at Law
RINGERT LAW CHARTERED
455 South Third
P.O. Box 2773
Boise, ID 83701-2773
(208) 342-4591

ALSO PRESENT: WILLIAM SHORE

REQUESTS OF COUNSEL - BY MR. REID

Page 57, Line 15 Off lot form for pieces of equipment

Page 5

1 February 23, 2009
2 9:32 a.m.
3
4 (Whereupon Deposition Exhibit No. 1 was
5 marked for identification.)
6
7 PROCEEDINGS
8 GREG BRIGGS
9 called as a witness at the instance and request of
10 the defendants, having been first duly sworn, was
11 examined and testified as follows:
12 EXAMINATION
13 BY MR. REID:
14 Q Would you state your full name, please?
15 A Greg Briggs.
16 Q Greg, my name is Jim Reid, and I represent
17 Bear River Equipment Company and William Shore in a
18 lawsuit that's been filed by McCormick International
19 USA, and today is the day that we set, with counsel's
20 concurrence here, to take your deposition.
21 It is my understanding that you are
22 actually employed by Agricredit. Is that right?
23 A Actually, I'm employed by -- I'm going to
24 give you a card here.
25 Q Okay.

Page 6

1 A -- by de lage landen, who owns Agricredit.
2 Okay?
3 Q Okay. We'll work our way through that.
4 A All right. Sorry.
5 Q Have you ever had your deposition taken
6 before?
7 A Yes.
8 Q So you kind of know the routine. It's real
9 important that we don't talk over the top of each
10 other, because, as you see, it's being taken down by
11 a court reporter here, and it's hard to take down
12 things if we talk over the top of each other.
13 A Okay.
14 Q The other main ground rule is that you
15 can't -- you need to answer audibly, if you could.
16 A Okay.
17 Q All right.
18 A She can't hear the rocks in my head?
19 Q Yeah. This is not an endurance test. We
20 can take a break at any time you want.
21 A Okay.
22 Q The reason that we're taking your
23 deposition today is I need to find out some
24 information from you relating to Bear River and the
25 duties and functions that you performed in relation

Page 7

1 to Bear River Equipment on behalf of either --
2 A De lage landen.
3 Q -- de lage landen or Agricredit, so, in
4 order to do that, I'm going to ask you, just briefly,
5 some questions about your background so that I can
6 understand how it is you got into the position you're
7 in, and then we'll just jump right into it. Okay?
8 A All right.
9 Q I take it you are employed.
10 A Correct.
11 Q By de lage landen?
12 A Yes.
13 Q And what kind of business is de lage landen
14 in?
15 A They're a financial organization.
16 Agricredit is one of the companies that they own
17 that -- I'm not sure what --
18 Q Okay. When you say de lage landen is a
19 financial organization, are they like a bank?
20 A They are owned by a bank. They are owned
21 by a bank out of the Netherlands, Rabobank. De lage
22 landen, as I understand it, is a holding company in
23 the United States, and one of the companies that they
24 hold is Agricredit.
25 Q Okay. How long have you worked for de lage

Page 8

1 landen?
2 A There was a switch a few years back. I
3 started with them in '94. I started with Agricredit
4 in '94. Somewhere along the line -- it was about
5 five, six years ago -- de lage landen acquired
6 Agricredit, okay?
7 Q Okay. When you say de lage landen is a
8 financial institution, do they loan money to people
9 or do they provide credit to people? Is that what
10 they do?
11 A Yes. Yes.
12 Q And who, primarily, does de lage landen
13 provide credit to?
14 A Well, in our --
15 Q Individuals or companies?
16 A Both, I think. I -- I'm not sure what they
17 do back in -- they're based out of Wayne,
18 Pennsylvania or the Philadelphia area. I'm not sure
19 what they do on their side of stuff. I just know
20 what they do with Agricredit.
21 Q Okay.
22 A Okay?
23 Q I'm showing you what's been marked as
24 Deposition Exhibit No. 1. That's the Notice of
25 Deposition. Do you recall being provided a copy of

Page 9

1 that document?
2 A Yes.
3 Q And in that document, I've asked, if you
4 could, if you would bring documents that you had
5 relating to your duties at Bear River, and I know you
6 have brought some documents. Could you just -- the
7 documents that are stacked in front of you, are they
8 documents that you have provided to counsel for
9 McCormick already in the past?
10 A They're documents that our office provided
11 to --
12 Q Mr. Fuller?
13 A -- Mr. Fuller. Yes. Sorry. Yes.
14 Q And you also brought with you some other
15 documents, is that right, today?
16 A Yeah. This would have been the -- this
17 document would have been the inventory that we did,
18 actually, at Lindhardt's right here after the
19 equipment was moved off Bear River's lot, and this
20 would have been the custody receipt of all the
21 equipment that --
22 Q Okay.
23 A -- we did -- or that was moved off Bear
24 River's lot to Lindhardt's.
25 Q I'm going to ask you some questions about

Page 10

1 these documents as we move on today, but the
2 documents you have stacked in front of you, at least,
3 to your knowledge, Agricredit and/or de lage landen
4 has supplied those --
5 A Maybe we just ought to say Agricredit.
6 Q -- has supplied those documents to
7 Mr. Fuller?
8 A Correct.
9 Q Okay.
10 A Correct.
11 Q What's the extent of your formal education?
12 A I've had two years of college.
13 Q Where was that?
14 A CSI in Twin Falls.
15 Q What year was that?
16 A Let's see. I graduated high school in '69,
17 so I would have been there -- I laid out a year, so
18 it would have been '71, '72.
19 Q Okay. And could you just kind of briefly
20 trace for me your employment history? Well, excuse
21 me. Did you serve in the military?
22 A No, I did not.
23 Q Could you just briefly trace your
24 employment history, then, since '71, '72?
25 A Since then, I went to work for a finance

Page 11

1 company, Capital Finance, which eventually became
2 Beneficial Finance. That ended in late -- let's see.
3 It would have -- that would have lasted until the
4 early '80s. Then I went to work for Allis-Chalmers
5 Corporation in '83, doing this type of work, and I've
6 been employed doing this type of work ever since.
7 Q Okay. When you worked for Beneficial
8 Finance, what did you do for them?
9 A Well, I started out as a manager trainee
10 and eventually -- in Burley, Idaho. Moved to
11 Meridian, and then I moved to -- as assistant manager
12 I moved to Meridian, and then as a manager in
13 Blackfoot.
14 Q Were you responsible for consumer loans or
15 business loans?
16 A Consumer loans.
17 Q Mostly cars, that kind of thing?
18 A Yeah, correct. Personal loans.
19 Q Yeah. And then you went to work for
20 Allis-Chalmers in the mid '80s; is that right?
21 A Correct. '83.
22 Q And what were your duties at
23 Allis-Chalmers?
24 A I worked with the dealers to help them
25 obtain financing for the customers, did floor plan

Page 12

1 checks, that type of stuff. Collections. Collected
2 retail accounts.
3 Q How did you help the dealerships obtain --
4 A We would -- I'd work with them through
5 their -- the manufacturers had financing plans, and
6 I'd try to -- basically, I was a salesman, trying to
7 get the dealers to send their paper through
8 Allis-Chalmers.
9 Q Okay. And you said with Allis-Chalmers you
10 had some duties with respect to flooring, too?
11 A Correct.
12 Q What were those?
13 A It was mainly items that had been
14 repossessed that were -- you know, the dealers
15 might -- probably were on recourse on them, that I'd
16 just order -- if they were company inventory, I would
17 just come in periodically and check them to make sure
18 that they were still there and in good shape.
19 Q Did you -- while you were with
20 Allis-Chalmers, did you do inventory inspections?
21 A Not -- I did inventory inspections on
22 company-owned inventory, company-owned assets, the
23 stuff that would have come back through
24 repossessions. As far as inventory through
25 manufacturing, no. Through the manufacturer, no.

Page 13

1 Q And were you with Allis-Chalmers clear
2 until you went to work for Agricredit?
3 A No. I worked for them until -- let's see.
4 They got bought out, I think, in '89 by Deutz, a
5 German company, and then they sold to Citicorp a year
6 or so later, and I worked for them until about '90.
7 '90, '91. And then I went to work for -- that
8 employment was terminated. Then I went to work for
9 Hesston Corporation as a -- same thing. Basically
10 sales and selling credit, convincing the dealers to
11 send us paper, building the portfolio.
12 Then in '92 I went to work for -- and
13 during that period, I -- actually, Fiat owned them,
14 the Italian company, owned Hesston. They eventually
15 sold Hesston to AGCO, and I went to -- and they
16 bought New Holland, and I went to work for New
17 Holland Credit for two years, and then from New
18 Holland Credit, I was hired -- in '94 I was hired on
19 to Agricredit.
20 Q And what were you hired on at Agricredit to
21 do?
22 A At that point, it was called basically
23 collections. Retail collection accounts and selling
24 of credit.
25 Q Okay. At that time, when you say "retail

Page 14

1 collection accounts," did Agricredit have inventory
2 that they sold direct to people?
3 A Yes. No, no. No. They would -- the
4 retail collection accounts would have been papers --
5 let's just say Bear River sold a piece -- a tractor
6 to Bill and he didn't pay his payment. I would go
7 out and collect the payment from Bill, so it was --
8 you know, it was everything that was done through --
9 through the dealership.
10 Q Okay. So when you say retail collections,
11 it was retail collections on behalf of dealerships
12 that worked with Agricredit; is that --
13 A No.
14 Q No?
15 A No. It was paper that -- the dealership
16 sold a tractor to an individual. We would buy the
17 paper from that dealership, and then when -- and then
18 I would go out and collect from the customer, if need
19 be. I managed the portfolio.
20 Q Okay. Agricredit would buy the paper from
21 the dealership, and then you would act as the
22 collector for Agricredit?
23 A Right.
24 Q Okay.
25 A Right.

Page 15

1 Q Did you ever get involved in any of the
2 negotiations with the dealerships to get them signed
3 on to be dealers for Agricredit?
4 A No.
5 Q Other than collecting the -- acting as a
6 collector for Agricredit in the '90s, what other
7 duties did you have with Agricredit?
8 A Well, occasionally I would do some
9 spot-check inventories with them on -- Agricredit
10 also did business or finances, AGCO equipment, and so
11 periodically I would have to go out and do joint
12 audits with the AGCO personnel to, you know, check on
13 that floor planning.
14 Q Now, what's AGCO?
15 A AGCO is an equipment manufacturer like John
16 Deere. Massey Ferguson tractors, Hesston balers, you
17 know, that type of thing.
18 Q Does AGCO have some connection to
19 Agricredit?
20 A No.
21 Q Other than the fact that they're an
22 equipment dealer?
23 A No. Other than AGCO Financing is owned 51
24 percent by de lage landen, 49 percent -- as I
25 understand it, 49 percent by AGCO. It's a joint

Page 16

1 venture.
2 Q Okay. And then sometime here about five or
3 six years ago, Agricredit was bought out by --
4 A De lage landen.
5 Q -- de lage landen?
6 A Yes.
7 Q Did your duties change?
8 A Yes.
9 Q Okay. What are your duties now?
10 A Okay. At that point, they separated the
11 sales part and the collection part of it. The sales
12 and the portfolio management part of it -- I
13 relinquished the sales part of it and just went into
14 portfolio management.
15 Q Okay. Let's -- so that I understand, I
16 take it you're making a differentiation between sales
17 and collections.
18 A Correct.
19 Q When you say sales, what are you talking
20 about? What's your definition of the sales part of
21 Agricredit?
22 A Going into the dealership and working with
23 the dealer to obtain the financing.
24 Q Actually soliciting the dealer to
25 participate on behalf of Agricredit to finance

Page 17

1 equipment: is that right?
2 A Correct.
3 Q And the collections is just collecting from
4 the customers after Agricredit buys the paper from
5 the dealer; is that right?
6 A Right. Also, at that point, we started
7 doing some -- they started their own wholesale floor
8 planning, like on McCormick tractors, and at that
9 point I would have to go in and -- if stuff was due
10 from the dealer, I would try to collect it, and when
11 I did audits. When I did, you know, periodic audits
12 on them.
13 Q Now, you just used another term. Probably
14 better define it for the deposition here. Wholesale
15 floor planning, what's that?
16 A That's where the dealer orders equipment
17 from the manufacturer; the manufacturer doesn't hold
18 the paper; they sell it to us. The dealer gets
19 the equipment; we do the flooring for them. We loan
20 them the money to carry the -- you know, to carry the
21 paper on the equipment.
22 Q The dealer orders a piece of equipment from
23 a manufacturer?
24 A Right.
25 Q Agricredit actually pays the manufacturer

Page 18

1 for that equipment; is that right?
2 A Correct.
3 Q And then the dealer is responsible to pay
4 Agricredit once the equipment is sold? Is that how
5 the flooring works?
6 A Yes.
7 Q And is that what you mean when you say
8 wholesale flooring agreement?
9 A Correct, yes.
10 Q In fact, isn't that the type of agreement
11 that was entered into between Bear River Equipment
12 Company and Agricredit, wholesale flooring agreement?
13 A I believe -- I believe so, yes.
14 Q Okay. At any rate -- I know I kind of
15 digressed there, but getting back into the present,
16 so your duties now do not involve sales?
17 A No, they do not.
18 Q You're now purely involved with just
19 collections?
20 A Yes.
21 Q And that would be collecting --
22 A Collections and some auditing. I mean, you
23 know, equipment -- inventory auditing.
24 Q Flooring audits?
25 A Yes. We have flooring audits.

Page 19

1 Q And what is the purpose of a flooring
2 audit?
3 A To make sure that the dealer is in
4 compliance with his terms, that if they sold a piece
5 of equipment, that we get paid for it.
6 Q Yeah. As I understand a flooring audit,
7 you go to the dealership to make sure that the
8 equipment that's located at that dealership for sale
9 is actually there?
10 A Correct. Correct.
11 Q And that any equipment -- do you -- are you
12 under the -- strike that. That's a bad question.
13 Under the arrangement, as you understand
14 it -- and, believe me, I'm not asking you for any
15 legal conclusions, okay? But under the arrangement,
16 as you understand it, when a person buys a piece of
17 equipment from a dealer that is financed by
18 Agricredit, the dealer then is supposed to pay
19 Agricredit back for that money financed; is that
20 right?
21 A Yes.
22 Q Do you have anything to do with either
23 maintaining or performing audit functions to make
24 sure that the money is paid to Agricredit once a
25 piece of equipment is sold?

Page 20

1 A Not directly.
2 Q Okay. Is that -- is there somebody at
3 Agricredit who does have that responsibility, that
4 you know?
5 A Yeah. They have an office staff there that
6 tracks that.
7 Q I take it that's not part of your -- that
8 was not part of your functions?
9 A If, when I'm at the dealership to do the
10 audit, there is a piece that's been sold and the
11 dealer has the funds for it, I'm -- yeah, sometimes I
12 collect a check and send it to the office.
13 Q Yeah, but --
14 A Okay.
15 Q And I appreciate that, but that really
16 isn't part of your duties, I take it. If you just
17 happen to be there, the dealer can give you the
18 check, right?
19 A Correct.
20 Q But under the dealer agreement, you're not
21 the guy the dealer is supposed to actually give the
22 check to?
23 A No.
24 Q So when you pick up a check from the
25 dealer, it's more of a matter of convenience than it

Page 21

1 is protocol? Would that be fair?
2 A Yes.
3 Q Okay.
4 A Yes.
5 Q So when a dealer sells a piece of equipment
6 and remits the -- and under the agreements -- and
7 we're going to get into them here in a minute --
8 remits the money to Agricredit, does Agricredit tell
9 you they've been paid?
10 A It would reflect on their -- on the
11 statement, the audit statement.
12 Q Okay. And we'll get into that in just a
13 minute here. I'm just trying, right now, to make
14 sure I understand what everybody's functions are.
15 I take it Agricredit provides you some sort
16 of a document when you're doing your inventory
17 checking so that you know what pieces of inventory
18 are supposed to be located at any given dealership.
19 A Yes, that's right.
20 Q What's that document called that they
21 provide you so that you know what you're looking for?
22 A Let me look here just real quick. It's
23 a -- well, the document is actually called a period
24 end statement.
25 Q And that's a document that's provided by

Page 22

1 Agricredit to you?
2 A Yeah. And also the dealer.
3 Q Okay. What year was it that your duties
4 changed from sales to collections? Do you remember?
5 That would have been whenever de lage landen took
6 over Agricredit?
7 A Yeah, whenever -- whatever year that was.
8 I --
9 Q Do you think it was prior to 2005?
10 A Yeah. Oh, yes. Yes, it was.
11 Q So, since 2005, which is going to be the
12 time frame we're going to be talking about this
13 morning, de lage landen is your employer and that's
14 who you reported to; is that right?
15 A Yeah, basically.
16 Q Okay. Who at de lage landen do you report
17 to? Do you have a specific supervisor?
18 A I report to -- well, it eventually goes to
19 Kevin Peters.
20 Q What is your understanding as to what his
21 function is?
22 A He's the wholesale supervisor. Supervises
23 the wholesale portfolio.
24 MR. FULLER: Counsel, before you go on, I
25 think -- maybe just a little clarification.

Page 23

1 Agricredit did not cease to exist.
2 THE WITNESS: No. No.
3 MR. FULLER: It's still a subsidiary of --
4 THE WITNESS: De lage landen.
5 MR. FULLER: -- de lage landen.
6 MR. REID: Okay.
7 THE WITNESS: Right.
8 MR. FULLER: So I didn't want to --
9 Q (BY MR. REID) Yeah. How about --
10 A Actually, what happens is Agricredit, I
11 guess, is basically a separate company, although, you
12 know, they're owned by de lage landen, but they
13 contract with de lage landen for me to provide those
14 services to do the audits and the collections, manage
15 the portfolio, so, where I don't actually work for
16 Agricredit, I -- you know, I perform a bunch of
17 services for them. I don't know. I guess they're
18 contract services. I'm not sure exactly how the
19 agreement is, but -- am I confusing you?
20 Q Well, a little bit. A little bit, but
21 let's see if we can straighten it out.
22 A Okay.
23 Q I realize that de lage landen owns
24 Agricredit.
25 A Owns Agricredit.

Page 24

1 Q Okay. But Agricredit, being a wholly-owned
2 subsidiary, exists in its own right?
3 A Correct.
4 Q And what I think I hear you saying is,
5 technically, you are employed by de lage landen, but
6 you actually perform services for Agricredit?
7 A Yes.
8 Q Would that be fair?
9 A Yes.
10 Q Will it be -- we won't be confusing to each
11 other in the deposition if we just refer to it as
12 Agricredit --
13 A No.
14 Q -- for the purposes of this deposition,
15 will we?
16 A No.
17 Q You'll know what I mean?
18 A Correct. Yes.
19 Q Because that's the terms that we've all
20 been using. And is that okay with you?
21 A Yes, that's fine.
22 Q Okay. And even though you don't do it
23 anymore, at one point in time, you were involved in
24 sales, meaning you set up dealerships for Agricredit;
25 is that right? Got financing for them?

Page 25

1 A I obtained the -- yes, obtained -- I didn't
2 set up the dealerships, but I obtained the financing.
3 Q That's what I meant. I misspoke. You
4 assisted the dealerships in getting them signed on so
5 that they could get financing from Agricredit?
6 A Correct.
7 Q And in order to do that, do you recall
8 documents -- corporate dealers' resolution
9 certificates that the dealers would have to sign?
10 A I would never get involved in that part of
11 it. Usually I would come in after the fact, after
12 the dealers had signed all that, so I would never get
13 involved in that.
14 Q But were you aware that they did sign
15 documents like that?
16 A Oh, yes. Correct.
17 Q Okay.
18 (Whereupon Deposition Exhibit No. 2 was
19 marked for identification.)
20 Q (BY MR. REID) Let me show you what's been
21 marked as Deposition Exhibit No. 2, and I'll
22 represent to you that that's a corporate dealer's
23 resolution certificate for Bear River Equipment. I
24 don't know if you've ever seen that before or not.
25 A No.

Page 2

1 financing agreement. Do you know what that is? Do
2 you know what a retail financing agreement is?
3 A I'm assuming what they're talking about
4 there is an agreement between Agricredit and the
5 dealer to provide retail financing and the terms that
6 they will do that under.
7 Q Yeah. I am, too. I have just never seen
8 or been provided a document that says "Retail
9 Financing Agreement." I just wondered if you knew
10 whether or not there's a specific form document that
11 Agricredit prints out that says "Retail Financing
12 Agreement."
13 A I'm assuming so. I've heard of them, but
14 I've never -- like I say, I wasn't involved in
15 getting them signed, so -- I'm assuming that there
16 is.
17 Q And then it says, "...and related recourse
18 supplement." Do you know what that is?
19 A Depending -- sometimes, with various
20 dealers, they -- they used to -- I don't think they
21 do much anymore, but some dealers would have some
22 recourse obligation under their retail financing
23 agreement to where they, for some of the equipment
24 that was sold to a customer, they might -- if it was
25 repossessed, there might be a recourse on that. They

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1 Q Okay. Have you seen the form -- a form
2 like that before?
3 A Yes.
4 Q It's an Agricredit form, I believe. If you
5 look down in the lower left-hand corner, it says
6 "ACC."
7 A "AAC." yeah.
8 Q Would that "AAC" stand for Agricredit
9 Corporation?
10 A Uh-huh, yes. Yeah.
11 Q Okay. My question for you about Exhibit
12 No. 2 is this: In 2005, was Bear River Equipment,
13 Inc. one of your dealers?
14 A Yes.
15 Q Did anybody else at Agricredit perform
16 sales or collection services for Bear River, Inc.,
17 except you, in 2005?
18 A Did they provide --
19 Q Either sales or collection work.
20 A We may have had some salespeople call on
21 them, but I wouldn't -- you know, I'm not involved in
22 that, so I wouldn't know for sure.
23 Q Okay. If you look down in that document,
24 under the -- where it says, "Be it resolved," do you
25 see that? It talks about a document called a retail

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1 might have to buy it back.
2 Q Yeah. Let me tell you -- see if -- this
3 goes back a lot of years, but I used to -- when I was
4 in law school, I worked for First Security Bank, and
5 I got involved in recourse paper. My understanding
6 of a recourse paper is an agreement that a lender or
7 financier, such as Agricredit would have with its
8 dealers, that says if you repossess something within
9 a certain period of days, you, the dealer, is going
10 to be responsible for it.
11 A Correct.
12 Q That's your understanding, too?
13 A Right.
14 Q Do you know whether or not Bear River
15 Equipment, to your knowledge, ever entered into a
16 retail financing agreement and recourse supplement
17 with Agricredit?
18 A I don't believe so. We, actually, a few
19 years back, changed that, and we have very few
20 recourse dealers anymore, so --
21 Q And I'm not trying to trick you or
22 anything. I'll represent to you I have not seen such
23 a document, but I just thought I better ask.
24 The next document that's listed on the
25 corporate resolution certificate is a wholesale

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1 financing plan. Then it says, "...and/or an
2 inventory security agreement." Is that a document
3 that -- an Agricredit document that you are familiar
4 with?
5 A No, I'm not familiar with them.
6 Q Okay.
7 A There again, I'm assuming those are in
8 place, but I don't execute those or have anything to
9 do with them.
10 Q Sure.
11 (Whereupon Deposition Exhibit No. 3 was
12 marked for identification.)
13 Q (BY MR. REID) I'm showing you what's been
14 marked as Deposition Exhibit No. 3. I'll represent
15 to you that that is an inventory security agreement
16 between Agricredit and Bear River Equipment that was
17 entered into, if we can look at the date here -- it
18 looks like it's March 22nd, 2005.
19 A Okay.
20 Q Did you play any role in the execution of
21 that document?
22 A No.
23 Q Okay. Have you seen that form document
24 before during the time you worked for Agricredit?
25 A I'm sure I've probably seen it. I couldn't

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1 tell you when, but I've probably seen them before.
2 Q Okay. My only question for you about that
3 document -- if you could turn to Page 3. Look
4 about -- under Subparagraph 4 -- excuse me, Paragraph
5 8 (d), as in dog, if you look down a few sentences,
6 you'll see a sentence that starts with the word,
7 "Notwithstanding the foregoing, debtor agrees to pay
8 secured party the amount of any extension of credit."
9 Do you see that sentence?
10 A Let's see. How far down? (d), and how far
11 down? How many sentences down?
12 Q (Indicating.)
13 A Oh, okay. There we go. Okay. Okay.
14 Q Have you read that whole sentence?
15 A Yes.
16 Q My understanding of that sentence is, is
17 that when a dealer, an Agricredit dealer, sells a
18 piece of financed equipment, they are then supposed
19 to pay Agricredit in a manner satisfactory to
20 Agricredit. Am I reading that, to your knowledge,
21 correctly? Is that my --
22 A Well, yeah. I mean -- yeah, when they sell
23 it, they need to pay for it, correct.
24 Q Well, what I'm driving at is -- I'm looking
25 at the words there. It says, "...and manner

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1 satisfactory to secured party." Do you know what
2 that means?
3 A I'm not -- no.
4 MR. FULLER: Let me just enter an objection
5 to the extent that it may call for a legal
6 conclusion. You can go ahead and answer.
7 THE WITNESS: No, I don't know what they're
8 talking about there.
9 Q (BY MR. REID) Okay. I didn't, either.
10 That's why I asked.
11 Who at Agricredit could I talk to to
12 discuss documents such as inventory security
13 agreements? Would that be Kevin Peters?
14 A Kevin Peters or Mac Braun, our counsel,
15 in-house counsel.
16 Q Okay. What was his first name?
17 A Mac.
18 Q Matt?
19 A Mac, M-A-C.
20 Q And his last name?
21 A Braun, B-R-A-U-N.
22 Q Where is he located?
23 A In Des Moines.
24 Q Okay. Is Kevin Peters also located in Des
25 Moines?

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1 A Yes.
2 Q Iowa?
3 A Yes.
4 (Whereupon Deposition Exhibit No. 4 was
5 marked for identification.)
6 Q (BY MR. REID) I'm showing you what's been
7 marked as Deposition Exhibit No. 4, and I'll
8 represent to you that that is one of a series of
9 wholesale financing requests and agreements that have
10 been provided to me by McCormick's counsel,
11 Mr. Fuller, but that looks to me like it's another
12 Agricredit form document. Am I correct?
13 A It appears to. I never see these, so...
14 Q Oh, okay. The only reason I say that, as I
15 look down right above the signatures, it says, "By
16 Agricredit Acceptance, LLC," so I just assumed that's
17 an Agricredit document.
18 A It appears to be, yes.
19 Q Okay. Have you -- you've never seen these
20 kind of documents before?
21 A I have -- no. I don't have anything to do
22 with those.
23 Q Do you have an understanding as to how it
24 is that any given piece of equipment gets financed by
25 Agricredit?

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1 A We usually have an invoice from the
2 manufacturer.
3 Q Right. Then does the dealer make a request
4 of Agricredit to then pay the manufacturer for that
5 piece of equipment?
6 A I'm assuming what happens is a dealer
7 orders a tractor from the manufacturer, with the
8 understanding that it will be placed on -- that he'll
9 have flooring available for it and -- it's sort of a
10 cycle it goes on through there. Like I say, I'm not
11 directly involved with that, so I'm not sure.
12 Q That's fine, and I'm not trying to put you
13 on the spot. I'm just trying to find out what your
14 knowledge is of these various documents.
15 A Okay.
16 Q So Exhibit No. 4, then, I take it what
17 you're telling me is that's not a document that you
18 deal with as part of your duties and functions with
19 Agricredit.
20 A No, no.
21 Q Okay. And the people that signed that
22 document, do you know any of those people?
23 A A couple of them.
24 Q Which -- who do you know?
25 A Well, Fran Miller and Melody -- she's the

Page 3:

1 questions, I would call her to, you know, clarify any
2 questions, whether monies were to be received or, you
3 know, why the interest started on a certain date and,
4 you know, if the dealer had a disagreement or
5 something. She's sort of an inter- -- go between, I
6 guess you'd say.
7 Q Okay. But, again, I take it your duties
8 and responsibilities do not involve accounting for
9 payments made by dealers to Agricredit?
10 A No. That would be -- probably Melody would
11 be -- you know, or one of her counterparts.
12 Q Okay. But maybe Melody is somebody I could
13 talk to to understand the accounting side of --
14 A Right.
15 Q -- the financing agreements?
16 A Actually, I think the gal that does the
17 McCormick one is Tammy Rafferty.
18 Q Who?
19 A Tammy Rafferty.
20 Q Tammy Rafferty?
21 A Uh-huh.
22 Q She would be a counterpart --
23 A A counterpart to Melody, yes.
24 Q Is Tammy Rafferty located in Des Moines,
25 Iowa, also?

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1 wholesale processing supervisor.
2 Q Okay. What's your understanding -- who
3 does Fran Miller work for?
4 A I'm assuming de lage landen. I really
5 don't know.
6 Q What's your understanding as to Fran
7 Miller's job? What does she do?
8 A She has something to do with the
9 bookkeeping, the accounting part of it.
10 Q Is she a person that you work with on a
11 regular basis?
12 A No, no.
13 Q Okay.
14 A No.
15 Q How about Tanya Hardy?
16 A I don't know her at all.
17 Q And how about Melody Webb?
18 A Melody Webb I know.
19 Q Do you work with her on a regular basis?
20 A Yeah, fairly regular.
21 Q What's your relationship with her?
22 A She would handle the -- on the audits, if I
23 have any questions -- and there's a couple other gals
24 in there with the same position as she is, but on the
25 audits -- as I do the audits, if I have any

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1 A Correct.
2 Q What is your understanding as to what Tammy
3 Rafferty's job is?
4 A She handles conversations with the dealers
5 as far as payments on account and with the
6 manufacturer and with McCormick, so she's sort of
7 being the go-between in there, would handle the
8 accounting part of it, makes sure that the -- you
9 know, the units are settled and paid for, interest
10 collected.
11 Q Okay. Just in general terms, could you
12 describe for me, from your perspective, how an audit
13 works? Just give me a -- kind of walk me through how
14 an audit is performed by somebody such as yourself.
15 A When I arrive at the dealership?
16 Q Yes.
17 A Okay. I would take one of their audit
18 forms, which has the equipment listed --
19 Q Okay. You say an audit form. Let me see
20 if I can find another document here.
21 A That's actually a -- no. That's actually a
22 statement the dealer gets. Our audit forms have
23 these little boxes at the -- or are basically the
24 same form, but they just put a box in there for us to
25 do a little --

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Q I'll tell you what. I've got one here that you brought this morning.
A Right. Yeah. We can look at that one.
Q Okay.
A Sure.
Q Let's get it marked as an exhibit, okay?
(Whereupon Deposition Exhibit No. 5 was marked for identification.)
Q (BY MR. REID) We're showing you what's been marked as Exhibit No. 5.
A That's the same one.
Q Okay. It's --
A Unless you want me to look at that one.
Q No, that's fine. That's fine.
MR. REID: If that's okay, Counsel, I'll look at the original and let the witness look at his copy.
MR. FULLER: That's fine.
Q (BY MR. REID) Okay. What is Exhibit No. 5?
A Well, that's the period end statement, but we also use it as an audit statement to follow the flow of the equipment as a dealership.
Q Okay. Up in the top left-hand corner, it says, "PM. Gregory Briggs"?

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A Briggs. That's me.
Q That would be you.
A Right.
Q What does "PM" mean?
A Portfolio manager.
Q This means that you are the person, at least as of October 31st, 2007, that managed the portfolio that would include Bear River Equipment Company --
A Correct.
Q -- is that right? Did you have other equipment dealers that you also managed besides Bear River?
A Yes.
Q About how many are you responsible for?
A Probably 25, 30.
Q Okay. And this period end statement -- I gather its period end is October 31st, 2007. What would be the period immediately preceding the period end statement in Exhibit 5?
A It would have been the prior month, so it would have been September 30th of '07.
Q So these period end statements are monthly --
A Monthly, correct.

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Q -- statements? Just tell me, first in your words, and then I'll ask you some questions, but what information is being conveyed to you in that document?
A Okay. If you go off the very first item, okay, it tells you the -- well, the loan number. There's a serial number. It gives you a serial number, manufacturer's invoice -- that would have been on one of those prior -- on this -- on Exhibit 4. Then it gives you a description. So I would have been looking -- I would have went on the lot and looked for a McCormick L155 loader with that serial number, 7191495.
Q This period end statement is telling you that a McCormick loader L155, Serial Number 7191495, should be on Bear River's lot as of October 31st, 2007?
A Correct.
Q And what in this document leads you to believe that that piece of equipment should be on the lot?
A It still shows a current balance.
Q Okay.
A There's invoice date, original balance.
Q That would be a current balance due

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Agricredit, right?
A Right.
Q So if that balance was zero, that would indicate to you that it had been sold?
A That it had been paid off. If you look down there four or five items, there's a couple items that are zeroed out. That means that they were paid.
Q Okay. So where it says "current balance," that means -- that at least is telling you that that piece of equipment has not been sold?
A Yes.
Q Okay.
A Well, that we haven't been paid for it.
Q Okay. All right. That you haven't been paid for that piece of equipment.
A Yes.
Q Okay. And if I look over here on the far left hand where it says "loan number," what does that refer to? What loan is that?
A It would have been -- if we can go back to Exhibit 4, if you look at when they invoiced a piece, they would assign a loan number to each one of these items, so this whole document wouldn't be one loan number. There would be five different loan numbers there.

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1 Q Okay. But if I look on Exhibit No. 4 --
2 show me where the loan number is.
3 A Well, it doesn't show it on there. Here
4 again, I'm assuming that once this is processed, they
5 assign it a loan number.
6 Q Well, is there some way --
7 A As they put it on the statement.
8 Q Okay. Who could I talk to to find out how
9 this loan number on Exhibit No. 5 is correlated, the
10 16103?
11 A Either Kevin Peters or Tammy Rafferty,
12 would be my suggestion.
13 Q And then as I read across -- and we'll just
14 stay on the first line of Exhibit No. 5 -- the
15 invoice date says 7-16-2006; is that right?
16 A Yes.
17 Q Is that telling you that that's when --
18 what happened on that date?
19 A That was the date that it was invoiced.
20 Q Meaning what?
21 A That one of these documents got processed.
22 They received one of these documents, a flooring --
23 or a -- whatever this is called -- wholesale
24 financing request document, and that it was placed on
25 inventory.

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1 Q Well, does that mean that an invoice was
2 sent to the dealer on that day?
3 A I'm assuming that's what they do. I --
4 like I say, I'm not involved in that, so --
5 Q Okay.
6 A I'm assuming one of these documents would
7 have been sent with that corresponding information.
8 Q Okay.
9 MR. FULLER: Counsel, before I -- I don't
10 want to interrupt, but --
11 MR. REID: That's okay.
12 MR. FULLER: -- there's a retail financing
13 agreement --
14 MR. REID: Oh.
15 MR. FULLER: -- that we've prepared for you
16 today, along with some other documents.
17 MR. REID: Oh, okay.
18 MR. FULLER: I'm sorry. I just wanted you
19 to know, if you wanted to --
20 MR. REID: Is that mine now or --
21 MR. FULLER: That is yours. All these are
22 yours.
23 MR. REID: Oh, okay. Well -- okay. Thank
24 you, Counsel.
25 Q All right. So if I read across -- and

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1 we're just using the first line here on Exhibit No.
2 5 -- reading across Line 1 of Exhibit 5, I get to the
3 column that says, "I-N-T start date." What's that?
4 A Interest start date.
5 Q Why does interest start on that date?
6 A The manufacturer often sends equipment to
7 the dealer and gives them an interest-free period, so
8 the -- probably is what happened is the manufacturer
9 is paying Agricredit for that equipment that's on
10 Bear River's lot for that period of time from the
11 invoice date until the interest start date, and on
12 the interest start date, then the dealer is
13 responsible to pay the interest.
14 Q But I thought the dealer didn't have to
15 pay -- under the inventory security agreement, didn't
16 have to pay for the equipment until he sold it.
17 A They're not paying for it. They're paying
18 interest.
19 Q Oh. So they got -- so the dealer has to
20 pay interest on the equipment even before it's sold?
21 A Correct. And there will also be some
22 periodic curtailments, usually a 10 percent
23 curtailment spread out through the term of the --
24 well, for an example --
25 Q Okay. Hold it.

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1 A Okay.
2 Q Hold it before you go on there. When you
3 say "curtailment," what are you referring to?
4 A Reduction in the amount that's owed on that
5 piece of equipment.
6 Q Reduction in the amount that's owed by the
7 dealer to Agricredit?
8 A To Agricredit.
9 Q Okay. And that's called a curtailment?
10 A Curtailment.
11 Q How does that happen?
12 A What do you mean "how does that happen?"
13 Q Well, why does somebody get a reduction?
14 A Agricredit or the finance company wants
15 that to keep the value of the equipment in line,
16 because, as it sits out on the -- you know, in the
17 elements and stuff, there's a perception that it
18 deteriorates some, and to get, you know, some dealer
19 investment in the piece of equipment.
20 Q Okay.
21 A Okay?
22 Q The next column over, it says, "Final due
23 paid date." What's that?
24 A That's the date that, whether it's sold or
25 not, the dealer owes for that piece of equipment.

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1 Q So a piece of equipment that's financed by
2 Agricredit, after a certain period of time, the
3 dealer just has to pay Agricredit?
4 A Correct.
5 Q Whether he sells it or not?
6 A Yes.
7 Q How does that square with the inventory
8 security agreement that says you pay for it when it's
9 sold?
10 A I -- you know, here again, I'm assuming
11 that there's some language in there that says that
12 they have to pay for it at the end of the -- you
13 know, at the end. You know, I'm not familiar with
14 that -- with all the language in that document, so I
15 really can't speak to it, but I'm just assuming that
16 there's some language in there that says that those
17 units are due at a -- you know, after a certain
18 period of time.
19 Q Okay. But you -- I take it -- what I hear
20 you saying is you're not specifically familiar with
21 what document you could point me to --
22 A No, no.
23 Q -- that would have that kind of language in
24 it that says --
25 A No.

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1 Q -- after a certain period of time you have
2 to pay for it whether you sell it or not.
3 A Right, yeah. No, I couldn't.
4 Q Okay. So once you get this period end
5 statement, then what do you do at that point?
6 A I schedule a -- with myself, I schedule an
7 inventory, to go to the dealer to do the inventory.
8 Q Okay. And the inventory then would consist
9 of what?
10 A Of going on the dealer's lot and looking
11 for the equipment that's listed on the inventory, on
12 this period end statement.
13 Q And in that regard, are you looking for all
14 of the equipment that has a current balance?
15 A Correct.
16 Q And if a piece of equipment -- if you don't
17 find that piece of equipment, what do you do?
18 Suppose -- let's just stay right with our example
19 here.
20 A Okay.
21 Q It's as good as any. Talking about our
22 McCormick loader, L155, Serial Number 7191495, you go
23 to the lot and let's say you don't find that there.
24 A Well, let's look at that one. I put an 01
25 code on there, and that 01 code -- if you look in the

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1 column, 01, that means it's on the lot.
2 Q Okay.
3 A So you go down four or five items, a couple
4 of them are paid. Then you go down to Loan Document
5 No. 16109, and there's a "DD" in there, which means
6 dealer default. That means it has been sold and not
7 paid.
8 Q Okay.
9 A And the customer's name that it was at.
10 Q Okay. How -- let's go down to that one,
11 then.
12 A Okay.
13 Q Okay? Because that's a McCormick tractor,
14 MC115, right?
15 A Correct.
16 Q And it's Loan Number 16109?
17 A Right.
18 Q And you're saying -- and this is your
19 writing that's on this document, right?
20 A Yes.
21 Q And you're saying that this tractor was
22 sold to a fellow by the name of --
23 A Neslanik.
24 Q If I can -- N-E-S-L-A-N --
25 A I-K.

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1 Q -- I-K. Neslanik, right?
2 A I think it was "nes-LAN-ik."
3 Q How do you know that that's who it was sold
4 to?
5 A That's what the dealer told me.
6 Q When you say "the dealer" --
7 A Well, that's what Tom Lewis would have told
8 me.
9 Q Okay. Not Bill Shore?
10 A No.
11 Q Tom Lewis. So Tom Lewis told you that was
12 sold to Mr. --
13 A Yes.
14 Q You specifically recall him saying that?
15 A Yes.
16 Q Okay. Did Tom Lewis tell you whether or
17 not he paid for it?
18 A He wouldn't have paid -- that's why the
19 "DD" is in there. That indicates dealer default,
20 that he has not paid, which would be the same as an
21 SOT. sold out of trust.
22 Q I understand that.
23 A Okay.
24 Q But the precise question I'm asking you is,
25 how do you know that Mr. Lewis didn't pay for it?

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1 A I never -- I, myself, never received
2 payment for. The office didn't get a check for it.
3 Q How do you know the office didn't?
4 A They told me they didn't.
5 Q Who told you?
6 A Well, it probably would have been Tammy
7 Rafferty.
8 Q She would have called you and said, "I
9 didn't get paid for that"?
10 A Well, I would have checked with her to see
11 if she got paid for it, and she would have said no.
12 Q That's what I'm driving at. Any piece of
13 equipment that you believe was sold to some -- a
14 person, did you then follow up and check with
15 somebody in Des Moines to see whether or not they had
16 received payment?
17 A Yes.
18 Q And you verified with -- on each and every
19 piece of equipment that you determined had been sold
20 off the lot that Des Moines had not been paid for
21 that piece of equipment?
22 A Correct.
23 MR. FULLER: Counsel, you're indicating
24 "every single piece of equipment." Are you talking
25 about those that we allege are sold out of trust?

Page 5

1 something that indicates -- or did you get a --
2 A Yeah. We have what we call an off lot
3 form.
4 Q Okay.
5 A For everything that's not on the lot, we
6 fill out a -- we have to give an explanation of where
7 it is.
8 Q And do you have any off lot forms?
9 A Now, with this document, there won't be any
10 there, because this was done after -- after the fact,
11 after everything was moved off the lot.
12 MR. FULLER: When you say "this document,"
13 you're referring to --
14 THE WITNESS: To Exhibit --
15 Q (BY MR. REID) Exhibit 5?
16 A Five, yeah. So maybe we want to go back
17 to --
18 THE WITNESS: Do you want to go back to one
19 of these others?
20 MR. FULLER: If Counsel does.
21 Q (BY MR. REID) Sure. Sure. I just --
22 sure.
23 A Okay. If I can get one for you here.
24 MR. REID: Let's go off the record.
25 (Discussion off the record.)

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1 MR. REID: Yes. I'm sorry, Counsel.
2 MR. FULLER: I think we need to clarify
3 that, because some pieces of equipment were paid for;
4 others were not.
5 MR. REID: No, no, no. I'm talking
6 about --
7 Q When you're -- using just the piece of
8 equipment we're talking about right here, what I hear
9 you telling me -- and please correct me if I'm wrong,
10 because I'm trying to understand -- is that you go to
11 the lot and you didn't find this particular tractor,
12 this 16109.
13 A Right.
14 Q And so you inquired as to what happened to
15 it. Is that what you did?
16 A Yes.
17 Q And you were told it was sold to this
18 fellow by the name of Neslanik --
19 A Right.
20 Q -- correct? And you then would have
21 checked -- called back to Des Moines and had somebody
22 verify whether or not Agricredit had been paid; is
23 that right?
24 A Right.
25 Q Do you fill out some sort of a report or

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1 (Whereupon Deposition Exhibit No. 6 was
2 marked for identification.)
3 Q (BY MR. REID) Okay. Showing you what's
4 been marked as Exhibit No. 6, could you describe for
5 me what that document is?
6 A It's what we call an off lot form.
7 Q Okay.
8 A It describes a piece of equipment, in this
9 case a CX105 tractor, the serial number, where it's
10 at, gives the customer's name, his phone number, his
11 location, and then the reason it's off. In this
12 case, it was off on a demo. And the date it was off
13 and the date it was expected to be returned.
14 Now, if it was sold and unpaid, it would
15 be -- it would also give us the date out and various
16 information of when we could expect payment, whether
17 it was a contract -- one of our contracts, another
18 lender's, if it was going to be cash.
19 Q Okay. And you believe, going now back to
20 Exhibit No. 5 and specifically the tractor that's got
21 a Loan Number 16109, Agricredit should have an off
22 lot document that matches that; is that right?
23 A Correct.
24 Q And you don't know if it's in your stack
25 there or not; is that right?

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1 A Oh, there would be one, but not on this
2 statement, because I'm saying I wouldn't have done
3 one on this particular document, because it was
4 done -- this document was done after all the -- after
5 all the equipment was moved off Bear Lake's lot.
6 Q No, I understand that, but --
7 A But somewhere in the audits, yeah, there
8 would be an off lot form that corresponds to --
9 Q Somewhere in Agricredit's files there
10 should be an off lot form that would match any piece
11 of equipment --
12 A That's off, correct.
13 Q -- that you've designated as -- is that
14 "DD"?
15 A DD, yes.
16 Q Dealer delinquent?
17 A Dealer default.
18 Q Dealer default. Okay. That you've
19 identified as a dealer default. There should be,
20 within Agricredit's files, an off lot form that would
21 explain where that piece of equipment is; is that
22 right?
23 A Yes. Yes.
24 Q And why -- and whether or not it's a demo
25 or whether or not it's a sale that wasn't paid for?

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1 A Yes. According to the information that we
2 received at that particular time.
3 Q Sure.
4 A Okay.
5 Q I take it -- well, who prepares the off lot
6 forms?
7 A Generally I do, or sometimes the dealers
8 do. I mean, if I'm there and they -- you know, I
9 mean --
10 Q And then they're sent to Agricredit?
11 A Well, they're completed there. I gather
12 these and send them in with my completed audit.
13 Q Okay.
14 A Okay?
15 Q So, going back, now, to Exhibit No. 5, it
16 looks to me like you're identifying one, two, three,
17 four, five, six, seven, eight, nine -- it looks to me
18 like, as of October 31st, 2007, you're identifying
19 nine pieces of equipment. Is that right?
20 A That are not on the lot, correct.
21 Q And so, for those nine pieces of equipment,
22 I should have an off lot form for each one of them,
23 shouldn't I?
24 A Yes.
25 Q I mean, not me, but Agricredit would have

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1 that?
2 A Right.
3 Q And that off lot form would explain where
4 they were and why they were there; is that right?
5 A Yes.
6 Q Okay. Now, do you -- Exhibit No. 5 is as
7 good example as any. Going back to our Loan Number
8 16109, okay, did you actually go to this guy's
9 residence and locate the tractor?
10 A I don't recall. I don't recall if I
11 actually went out there or if we just contacted him
12 and he had told us it had been paid or if Tom Lewis
13 told us that it was sold and he'd been paid for it
14 and we didn't have the money -- or he hadn't paid us
15 for it.
16 Q On any of those pieces of equipment, those
17 nine pieces of equipment, did Tom Lewis acknowledge
18 to you that these nine people had paid for the
19 equipment -- had paid Bear River for the equipment
20 but that he did not pay Agricredit?
21 A Yes.
22 Q He said he had not paid Agricredit?
23 A Yes.
24 Q So if Mr. Lewis testified in a deposition
25 that, to his knowledge, he was current with

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1 Agricredit as of October 2007, you would consider
2 Mr. Lewis not being truthful?
3 A Yes.
4 Q Did he tell you why he hadn't paid for
5 these pieces of equipment?
6 A He didn't have the -- well, long story
7 short, he didn't have the money.
8 Q Did he tell you how come he didn't have the
9 money?
10 A Bill wouldn't give it to him.
11 Q Okay.
12 A Mr. Shore wouldn't give it to him.
13 Q Did he tell you that he expected Mr. Shore
14 to give him the money?
15 A Well, not for that specific thing, but to
16 fund money for the -- I mean, that was his reason.
17 He said he couldn't do anything because he wasn't
18 getting -- the business wasn't being properly
19 capitalized or properly funded.
20 Q So, in order for me to find out at what
21 point in time an off lot report was prepared for each
22 of these nine pieces of equipment, I'd have to get
23 those records from Agricredit; is that right?
24 A Right. Although they should be in those
25 forms that Mr. Fuller gave to you earlier. May

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1 through, what, September, I think.
2 Q These right here?
3 MR. FULLER: Yes. Counsel, we provided you
4 January through August. The month of May may be
5 missing. I've asked them for that particular month
6 again, in hopes that --
7 THE WITNESS: I think it was in there.
8 MR. FULLER: And it may be that it's in
9 there. I just didn't see a particular form that said
10 "this is May" in the way they sent it to me.
11 MR. REID: Well, I'll -- and I appreciate
12 that, Counsel, and I will -- we'll check, and I'll
13 get back to you if I'm minus anything, but that's
14 what I'm looking for.
15 Q And if I would ask you, if you wouldn't
16 mind, Mr. Briggs, to look -- if you get a chance, if
17 you could just locate and let Mr. Fuller know whether
18 or not there is an off lot form for each one of these
19 pieces of equipment.
20 A Okay.
21 Q Would I be correct -- just to kind of tie
22 the loose ends up here on this topic -- that, other
23 than determining during an audit that one of these --
24 all of these nine pieces of equipment were not
25 located on the lot, you didn't physically go to the

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1 residence or place of business where the customer was
2 to verify that that piece of equipment was at that
3 place? You just discussed it with Mr. Lewis; is that
4 right?
5 A It could have been a combination of all. I
6 mean, I might have just --
7 Q Okay.
8 A You know, I mean, if he said, "Hey, I sold
9 that tractor. The guy's got it," you know, I might
10 have -- I probably would have called and confirmed
11 with the guy that he did have the tractor and he paid
12 for it, but not necessarily go out and actually look
13 at the piece of equipment.
14 Q Okay. That's a good --
15 A When everybody was in concurrence that, you
16 know, it had been, you know --
17 Q Sure. And that's a good point. Do you
18 maintain records of your phone calls to people like
19 this that would verify that you talked to Mr. --
20 A Well, generally it's on the off lot form.
21 Like on this one. It says right here -- I circled
22 that I did it by phone. Now, not --
23 Q Oh, okay.
24 A In a case where -- this is a demo, but in a
25 case where -- on a demo, I may -- the first time it

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1 had been out, I may not have -- you know, usually we
2 give the dealer some latitude to get things done. If
3 it's going to be back in a couple days, we give them
4 a little bit of latitude to do that, so we may not
5 phone verify or physically verify every piece at
6 every audit. Usually we try to do a percentage of
7 them.
8 (Whereupon Deposition Exhibit No. 7 was
9 marked for identification.)
10 Q (BY MR. REID) I show you here what's been
11 marked as Deposition Exhibit No. 7, and that's a
12 document that's titled "Period End Statement" for
13 11-30-2007, but that's -- it looks a little different
14 than Exhibit No. 5 in terms of its format, because it
15 doesn't have these boxes over here.
16 A Right. This would have been the statement
17 that the dealer normally gets.
18 Q Okay. Does --
19 A It should look -- other than the boxes, the
20 audit boxes, the information should be the same on
21 stuff that I --
22 Q That was going to be my question. Exhibit
23 No. 7 is the monthly statement that a dealer gets
24 that would correspond to the monthly statement that
25 you get which is Exhibit No. 5?

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1 A Yes. The information should be the same,
2 correct.
3 Q So if I looked -- and I think it is, so if
4 I looked, for example, on -- let's see if we can
5 find -- yeah. If I look down on Exhibit No. 7, just
6 about five -- I see a 16109 loan number.
7 A Okay.
8 Q Right? And that's a McCormick MC115
9 tractor.
10 A Right.
11 Q So it has a current balance due of $40,331,
12 right?
13 A Right.
14 Q Does that match Exhibit No. 5?
15 A 40,331.89. Let's make sure. Yeah. Yes.
16 Although these are different dates. Exhibit No. 5 is
17 dated 10-31. Number 7 is 11-30, so they're
18 different --
19 Q No, I understand, but they're talking about
20 the same tractor?
21 A Right.
22 Q Just one month later?
23 A Correct.
24 Q If you go back on Exhibit No. 5 -- it
25 doesn't make any difference which one you look at,

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1 because I just looked, and the numbers are identical.
2 It says, "Original balance, $48,146.54." Then it
3 says, "Current balance, $40,331.89." If that
4 tractor -- if Agricredit hadn't been paid anything by
5 the dealer, how does the balance go from 48 down to
6 40?
7 A They would have made a curtailment or two.
8 Q They would have made a curtailment, meaning
9 what?
10 A A principal reduction on the tractor.
11 Usually those curtailments are 10 percent, so
12 that's -- that's probably --
13 Q Is curtailment money that the dealer pays
14 to Agricredit?
15 A Yes.
16 Q And that's because the value of the
17 collateral, the tractor, goes down over a period of
18 time, so Agricredit says you've got to pay --
19 A The perceived value goes down, correct, so
20 they --
21 Q Charge you --
22 A They want them to reduce the balances.
23 It's like making a loan payment.
24 Q Yeah. Okay.
25 A Okay.

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1 Q I'm with you. All right.
2 (Whereupon Deposition Exhibits 8 and 9 were
3 marked for identification.)
4 Q (BY MR. REID) Showing you what's been
5 marked as Deposition Exhibit 8, can you tell me what
6 that document is?
7 A That's a custody receipt that Lindhardt
8 International, right next door here, signed on
9 October 1st of '07 of all the equipment that was
10 picked up from the Bear River lot and moved to
11 Lindhardt's, at our request.
12 Q Okay. So all this means is -- these
13 various pieces of equipment on Exhibit No. 8 you're
14 not saying Bear River sold out of trust at all?
15 A No.
16 Q Okay. That's just a list of equipment that
17 was placed at Lindhardt for sale, I take it.
18 A Well, I guess you could basically say it
19 was repossessed from -- it was moved from --
20 Q What was --
21 A I'm not sure if that's the correct term or
22 not, but it was removed from Bear River's lot to
23 Lindhardt's so we could better secure the equipment
24 that was -- that -- you know, because we didn't have
25 any trust in Bear River anymore, so we, you know,

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1 moved our equipment to Lindhardt's.
2 Q Did you make some sort of deal with
3 Lindhardt's? What's he supposed to do with it?
4 A He was just storing it.
5 Q Did you agree to pay him to store it or --
6 A No.
7 Q Do you know how long he was storing it for?
8 A Well, you know, it's sort of funny. I just
9 got a letter from him saying, "Hey, it's been 18
10 months. What are we supposed to do with this stuff?"
11 you know. So, no. Actually, there was no time limit
12 on it.
13 Q So he's just been kind of holding it for
14 you?
15 A Yeah, right.
16 Q Are you the person that he deals with, or
17 is he dealing with somebody in Des Moines?
18 A I deal with him mostly, yes.
19 Q And so -- and you just got a letter from
20 him saying, "What am I supposed to do?"
21 A Right.
22 Q What are you going to --
23 A Well, I just forwarded it on to Kevin
24 Peters and said -- you know, and he -- and what it
25 was was a letter that he wrote to McCormick, saying,

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1 "Hey, you know, this stuff" -- you know, "I took this
2 stuff under your direction from" -- you know, "years
3 in Agricredit's direction, you know, to help you out,
4 and now it's been sitting here for 17 months and, you
5 know, I want something done with it. I want to
6 be" -- you know, "I want to be paid for some of my
7 trouble. I want it moved." You know, "Do
8 something."
9 Q Okay. Showing you what's been marked as
10 Deposition Exhibit No. 9, what is that document, if
11 you know?
12 A I don't remember seeing this until
13 Mr. Fuller showed it to me this morning, but what it
14 looks like to me is the list of the equipment
15 that's -- the top part of it where it has the
16 customer's name is SOTs that have been sold out of
17 trust that we have not been paid for.
18 Q You're talking about Bear River's
19 equipment?
20 A Bear River's equipment, correct.
21 Q I haven't checked, but if you look at these
22 names over here, where it says "customer" --
23 A Right.
24 Q -- should they match up with the names on
25 Exhibit No. 5?

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A I'm assuming. They should, yes. Yes.
Q Okay. There seems to be one more person on Exhibit 9 than -- although -- there seems to be ten names on Exhibit No. 9 and only nine names on Exhibit No. 5.
A Yeah. I'm not sure, even, the date of this document. See, that Phillips doesn't -- I think we got paid for that one. That's Serial Number 915. It doesn't say what it is. I'm not even sure of the date on that, because it doesn't seem to be dated, does it?
Q No. Do you know how it is you got this document, other than from Mr. Fuller?
A No.
Q So you didn't have anything to do with it?
A No.
Q Okay.
(Whereupon Deposition Exhibit No. 10 was marked for identification.)
Q (BY MR. REID) Showing you what's been marked as Exhibit No. 10, now, that's a document that, up in the upper right-hand corner, says "McCormick" on it. It doesn't say "Agricredit." First of all, do you recognize that document?
A Yes.

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Q You do?
A Well, I mean, I recognize the form, not necessarily -- not necessarily everything that's written in it, but the typical form. Yeah, they -- we -- this is actually a settlement form, a McCormick settlement form, and for some reason, Tom, when he remitted money to us, would use a McCormick form rather than the actual Agricredit form that he was supposed to be using. And, of course, he was sending us money, and if things corresponded, we'd accept that form, but --
Q I should have had her split those. That's not part of it. That's going to be the next one.
Okay. But do you know whose writing -- whose handwriting that is on that document?
A I'm assuming it's Tom Lewis's.
Q Okay.
A I believe the total down at the bottom where it says 236,423.78 is mine. Everything else would have been either Tom or Maureen's, but I -- Tom usually did this, so I'm assuming that's Tom Lewis's handwriting.
Q This is called a remittance form?
A Yeah, it is, isn't it? Yeah.
Q So when does it -- you say this is usually

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filled out by the dealer?
A Yeah, but --
Q Is that right?
A Yeah. Although this actually is not a -- this is not actually a remittance form. It's a -- it's actually a listing of the equipment that hasn't been settled for.
Q Well, I'm just looking at the document.
A Yeah.
Q I don't know what it is, but at the top right-hand corner it says "McCormick," right?
A Right.
Q Top left-hand corner it says "Remittance Form." And do you think the number 236,423.78 -- that's your handwriting?
A Yes.
Q But you think the other writing on that document is somebody else's?
A Yes.
Q In the far right-hand column, it says "Net Amount Paid." Isn't that what that says?
A Uh-huh.
Q Did you attempt to verify -- how is it you came into possession of this document if you wrote 236,000 on it?

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A Well, here I'm sort of going back by memory. I think what Tom did is made a list of all the equipment that had not been -- that he'd sold and not been paid for.
Q Okay. When you say "sold and not been paid for," are you saying that Tom had not been paid for it by the customer or that Agricredit --
A Agricredit had not been paid for.
Q Because that list just happens to match the exact SOT list that you prepared.
A Looks like it, yes.
Q But the reason I'm curious is this document indicates that those sums were paid, doesn't it?
A I guess you could interpret that, but there's no corresponding check number or check amount or copy of a check to verify that.
Q Oh, I understand that, but if I just look at this document, it looks to me like it's -- it says it's a remittance form, and it says "net amount paid" on it.
A Right. But I think what it was used for is to make a listing of -- he used it to make a listing of the equipment that had been sold and not paid. And then if he took his various discounts and stuff, you know, what he'd actually end up owing on this

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1 stuff in the long run.
2 Q Okay. But then did he provide -- did
3 Mr. Lewis provide this document to you, then?
4 A I'm assuming so, because -- since that is
5 my writing. And then under the "30-day cash
6 discount" section, I have written -- that's my
7 writing where I've wrote in like, you know, Meyers,
8 Oxborrow, Westates, Higley, Neslanik on each of those
9 items.
10 Q So the column that says "30-day cash
11 discount," all the writing under that column, that's
12 your writing?
13 A That's my writing.
14 Q Okay.
15 A So I'm assuming that Tom Lewis gave me this
16 form and I went and filled out these -- you know, the
17 names after the fact, after he'd given me that stuff,
18 so we could identify which -- you know, which
19 customers we were talking with.
20 Q Okay. What was that exhibit number? I'm
21 sorry.
22 A Ten.
23 Q Ten.
24 (Whereupon Deposition Exhibit No. 11 was
25 marked for identification.)

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1 Q (BY MR. REID) I show you what's been
2 marked as Exhibit No. 11. Do you recognize that
3 document?
4 A No.
5 Q Have you ever -- does that document look
6 like anything you've ever prepared?
7 A No.
8 Q There's some writing on it. It says --
9 over there on the right-hand side it says "13.25 past
10 due percent." Do you know who wrote that?
11 A No.
12 Q Do you know where this document came from?
13 A It would be an assumption on my part that
14 it came from -- it was something that somebody in the
15 office prepared on the equipment that -- well, the
16 remaining equipment. It's stuff we moved to
17 Lindhardt or the stuff that we moved -- stuff that
18 was -- the bottom part is probably SOT stuff. Yeah,
19 it is, because it says two SOTs, so --
20 Q So I'd need to talk to somebody from Des
21 Moines about this document, you think?
22 A Right. But this -- and here again, it's an
23 assumption on my part that if you go back to Exhibit
24 Number -- where are we? Seven or --
25 Q Five?

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1 A -- or five, that all this stuff would
2 correspond to the equipment that's on there. It's
3 the same equipment.
4 Q Okay.
5 (Whereupon Deposition Exhibit No. 12 was
6 marked for identification.)
7 Q (BY MR. REID) I'm showing you what's been
8 marked as Exhibit No. 12, and the first page of that
9 exhibit -- well, there's a form up at the top that
10 says "Check Application Advice." Do you see that?
11 A Uh-huh.
12 Q Is that an AAC form?
13 A It appears to be. It's nothing that I
14 would normally see. It looks -- it appears to be
15 something they have done in the office.
16 Q Okay. But then there's a check made out to
17 Agricredit for 22,000. What I was really interested
18 in is the next page. Do you know what that next page
19 is, that dealer settlement worksheet, what that is?
20 A That would be the settlement -- one of
21 Agricredit's settlement worksheets. Normally it
22 would be sent in with the check showing which invoice
23 number that the check ought to be applied to.
24 Q The settlement worksheets -- the Agricredit
25 settlement worksheet, would that be similar to the --

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1 Exhibit No. 10, only an Agricredit form?
2 A Yeah, similar.
3 Q Okay. I take it you aren't -- you don't --
4 you didn't fill out these worksheets.
5 A No.
6 Q This is something the dealer does?
7 A This is something the dealer does, correct.
8 Q Okay.
9 (Whereupon Deposition Exhibit No. 13 was
10 marked for identification.)
11 Q (BY MR. REID) I'm showing you what's been
12 marked as Exhibit 13. That's the same as Exhibit No.
13 12, in terms of it's got a Check Application Advice
14 on the front and a check to Agricredit, but if you
15 look at the dealer settlement worksheet that
16 accompanies it, that says "McCormick Credit" on it.
17 Do you know why a dealer would fill out a settlement
18 worksheet on a McCormick Credit document but send the
19 check to Agricredit?
20 A Other than that's the form you fill, I
21 don't know why he -- he was supposed to be -- they
22 should -- it should have been on an Agricredit form,
23 although if they'd sent it on a McCormick form with a
24 check made out to us and all the information
25 corresponded, we would -- you know, we wouldn't

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1 question it, so...
2 Q Okay. As part of your duties as a -- I'm
3 trying to figure out how to characterize your job.
4 Are you considered an auditor? Are you considered a
5 collector? How would you define yourself?
6 A My job is portfolio manager.
7 Q Okay.
8 A Okay. So I manage the portfolio in the
9 manner -- what needs to be -- what needs to be done.
10 Q And as a portfolio manager, what -- just --
11 can you kind of just run through everything that you
12 would be responsible for in terms of a portfolio? I
13 know you're responsible for collections and I know
14 you're responsible for flooring audits. We've been
15 talking about that.
16 A Right.
17 Q What else are you responsible for besides
18 those two things?
19 A Well, on the retail side, on the customer
20 side of stuff, if, you know, a guy can't -- if
21 somebody can't pay or they need some additional
22 terms, I might re- -- you know, help them in
23 restructuring their account, you know, for different
24 payment schedules..
25 Q You're talking about with the dealer now,

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1 restructuring the dealer's account with Agricredit?
2 A No. The customer. The retail customer.
3 Q Oh, okay. The guy who buys the tractor?
4 A Right.
5 Q If he can't pay -- oh. You'll --
6 A Then I'll go meet with him and modify his
7 agreement.
8 Q Maybe get involved in a work-out program
9 with him?
10 A Right.
11 Q Okay. Any other duties?
12 A As far as -- well, I conduct audits, which
13 we've talked about, you know, and follow up on the
14 inconsistencies in the audit, you know, whether it,
15 you know, it hasn't been paid, whether it's demo and
16 -- you know, I mean -- you know, basically verify
17 what the dealer has been telling me.
18 Q Are you involved at all in the agreements
19 between McCormick and Agricredit?
20 A How so?
21 Q Well, Agricredit -- McCormick is a
22 manufacturer.
23 A Correct.
24 Q The dealer orders -- wants a tractor from
25 McCormick; Agricredit pays for the tractor; and then

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1 when it's sold, the dealer is supposed to pay
2 Agricredit, right?
3 A I don't get involved until it shows on the
4 inventory list.
5 Q Right.
6 A Okay.
7 Q Are you aware of any agreements between
8 McCormick and Agricredit whereby Agricredit can
9 demand that the manufacturer pay Agricredit for a
10 piece of equipment that's sold out of trust?
11 A I understand there are some agreements
12 in -- although I don't deal with them, but I
13 understand there are -- in some cases, there's
14 some -- I'm trying to think of the word for the
15 thing. An agreement between the manufacturer and
16 Agricredit that if the dealer doesn't pay, that the
17 manufacturer will, yeah.
18 Q Right. And do you get involved with that
19 at all?
20 A No.
21 Q That was my only -- I realize there are
22 those things, but I don't want to ask you a bunch of
23 questions about something that you're not -- that's
24 not part of your function.
25 You don't get involved, on behalf of

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1 Agricredit, in preparing audits or enforcing
2 agreements with manufacturers?
3 A No, I do not.
4 Q Okay. You are at the dealer and ultimate
5 customer level?
6 A Correct. Correct.
7 Q Okay.
8 MR. FULLER: Counsel, this -- did you want
9 that as part of an exhibit? I don't know if it
10 ever --
11 THE WITNESS: I think you did, didn't you?
12 MR. FULLER: Well, you separated it.
13 THE REPORTER: It's 11.
14 MR. REID: Yeah, I marked it as a separate
15 exhibit. When my office put these things together,
16 they stapled them together, but I knew they didn't
17 match.
18 MR. FULLER: Okay.
19 MR. REID: Okay. Let's take a break here
20 for a minute.
21 (Recess.)
22 Q (BY MR. REID) I've got some more questions
23 on Exhibit No. 5, and you've got it right in front of
24 you there, I think. The third page of that
25 exhibit --

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1 A Okay.
2 Q -- I see your signature on it, but whose is
3 the other signature?
4 A Bob Lindhardt of Lindhardt International.
5 Q Okay. How come he signed this document?
6 A Well, that's corresponding with Number 8.
7 That's the equipment that -- well, I would have
8 done -- I would have done an audit. I still
9 continued to do audits on that equipment after --
10 even after it left Bear River's lot and was moved to
11 Lindhardt, so this was -- I did that on November 6th,
12 and we moved that equipment in September sometime, I
13 believe.
14 MR. SHORE: Yeah, it was.
15 THE WITNESS: So I would have continued to
16 do audits on that equipment.
17 Q (BY MR. REID) Okay. Now, these customers
18 that are set forth in this equipment, would I be
19 correct that the dealer delinquency didn't all occur
20 for all of these customers in the same month?
21 A Actually, it did. We finally determined
22 that these things were sold all at the same time. I
23 mean, it all came to a head at the same time. There
24 may have been some out at various times and, you
25 know, they'd say, "Well, we're getting financing.

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1 It's on" -- they may have actually been sold and he
2 told him it was on demo. You know, we'd have to go
3 back and look through some of his previous audits,
4 but, I mean, he -- Tom was pretty famous for saying,
5 "Well, it's out on demo," when it was actually -- you
6 know, when it maybe had been sold.
7 And then on -- he always had a lot of
8 equipment out. In one particular month, he had just
9 about everything back on the lot. Well, I heard
10 through the grapevine that one of his employees
11 took -- you know, said that he'd have him go out and
12 gather all this equipment up and say, "Hey, it's got
13 a warranty issue," or something. "We've got to bring
14 it in for warranty," knowing that we're going to be
15 coming in shortly for an audit.
16 Q When Tom Lewis would tell you that a given
17 piece of equipment was out on demo, would you go
18 check to see if it was?
19 A Depending on the timing on it, maybe -- the
20 first time, probably not. I mean, we had to
21 verify -- you know, we usually verified a percentage
22 of those -- of the demonstrations.
23 Q But if I look through the documents that
24 counsel has kindly produced for me here, or maybe I
25 need to make a request a little later, but shouldn't

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1 I have an off lot report that would tell me when
2 every one of these pieces of equipment was sold?
3 A If they had been -- there should -- yeah,
4 there would be an off lot form saying whether it
5 was -- what the status of it was and whether it had
6 been verified or not.
7 Q Okay. And if it was off the lot because of
8 a demo, then Bear River Equipment wouldn't owe for it
9 at that time, would they?
10 A Not at that point, no.
11 Q Right. So they -- until the customer buys
12 it, Bear River doesn't have to pay for it?
13 A Right.
14 Q Okay. So I should be able to look at the
15 off lot reports for each one of these and determine
16 when a piece of equipment was sold, should I not?
17 A Well, when we became aware that it was
18 sold.
19 Q Okay.
20 A Okay.
21 Q When Agricredit became aware --
22 A Correct.
23 Q -- that it was sold. And, again, I realize
24 you're recalling from memory here, but do you think
25 that Agricredit would have become aware that all nine

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1 of these pieces of equipment were sold in the same
2 month?
3 A Some of that -- some of it had been
4 ongoing. I mean, it's when we finally determined
5 that all this stuff had been -- you know, it had been
6 sold and paid -- it had been sold and he had been
7 paid for it and hadn't paid us. Some of it may have
8 spread back over, you know, various months, you know,
9 for various -- he might have told us it was on demo,
10 it was -- he was, you know, waiting -- financing from
11 an outside source or something like that.
12 Q I guess what I'm trying to find out, in
13 relationship to the 31st of August, 2007 or the 6th
14 of November, 2007, when is the first time that you,
15 personally, were aware of the fact that Mr. Lewis had
16 sold a piece of equipment and not paid Agricredit?
17 A It would have been the August audit of '07.
18 Q August of 2007?
19 A Correct.
20 Q So prior to August of 2007, you would not
21 have been personally -- you were not aware of any
22 piece of equipment that he sold out of trust?
23 A No.
24 Q So all of the out of trust sales would have
25 occurred, then, between August and November 2007?

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1 A No. They may have occurred prior to that.
2 I just became aware that they were sold out of trust
3 in August of '07.
4 Q Okay. Do you know how much time Agricredit
5 gives a dealer to pay -- after a piece of equipment
6 is sold, how much time does the dealer have to pay
7 Agricredit?
8 A Well, see -- it's actually -- I think it's
9 actually due when they sell it, but they might give
10 them a ten-day grace period for, you know, transfer
11 of funds and such like that, so...
12 Q Let's assume that one of these pieces of
13 equipment was sold prior to August --
14 A Okay.
15 Q -- out of trust. How would you be notified
16 of that sale?
17 A Well, normally, the dealer -- I mean, if
18 he's being honest with you, they tell you, you know,
19 "I sold it. This is how we're going to" -- "This is
20 one we're going to pay for it. This is what's going
21 on." On some of these that were out of trust, I had
22 to make contact with the customers to find out
23 that -- you know, I finally went down and, you know,
24 chased them down to find out exactly what happened,
25 and then, you know, they'd say, "Well, I paid him,

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1 you know, a month ago," or whatever, you know.
2 Q Would I -- well, but if the customer had
3 paid for the piece of equipment the month prior, then
4 wouldn't your audit the month prior have either
5 showed that it was sold or out on demo?
6 A Maybe, maybe not, depending on where, you
7 know --
8 Q Do you think there were sometimes when
9 Mr. Lewis may have told you that a piece of equipment
10 was out on demo when, in fact, it was really sold?
11 A Oh, yes, definitely.
12 Q Okay. That's what I'm driving at. In your
13 opinion, as an auditor for Agricredit, do you think
14 that some of these nine pieces of equipment had been
15 sold quite a bit before August, but you just didn't
16 know about it because Mr. Lewis told you they were on
17 demo?
18 A Correct, yes.
19 Q Once -- do you know whether or not -- does
20 Agricredit have a policy on demos? Are dealers
21 allowed to -- how long is a dealer allowed to let a
22 customer use a tractor on demo, if you know?
23 A There is a policy. I'd have to read it,
24 but, I mean, it's, you know, usually a 30 -- you
25 know, with -- between -- if we do a 30-day audit, it

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1 ought to be back, you know, either sold or back on
2 the lot at that point, or a reasonable explanation of
3 why it's not, you know, why the customer still has
4 it.
5 Q So if Mr. Lewis, say, told you in April of
6 2007 that a tractor was on demo, when you came back
7 in May, the next month, you would expect to see that
8 tractor?
9 A Well, yeah, right.
10 Q Were there occasions when Mr. Lewis would
11 tell you more than one month in a row that tractors
12 were still out on demo?
13 A Possibly. I'd have to go back and review
14 files.
15 Q In any event, when you learned in August
16 that some of these -- that these nine tractors had,
17 in fact, been sold and Agricredit says they hadn't
18 been paid for, did you notify Bill Shore?
19 A Myself, personally, no.
20 Q Do you know if anybody at Agricredit
21 notified Bill Shore?
22 A Going back, I'm sure -- I'm -- you know,
23 I -- I assume they do, because Bill showed up. I
24 mean, I -- you know, I'm sure he was notified.
25 Q Okay. I'm talking about prior to August of

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1 2007, do you think anybody did?
2 A Well, prior to August of 2007, we didn't
3 know stuff was out of trust. I know there had been a
4 couple letters, because of the ongoing problems we'd
5 had, that had been sent out.
6 Q I recall seeing a letter -- just to see if
7 this rings a bell with you, I recall seeing a letter
8 from Agricredit to Bear River, basically complaining
9 that they were violating Agricredit's policy in terms
10 of letting demos go out too long. Do you recall --
11 A Or having too many pieces out. Yeah, I
12 vaguely remember that, yes.
13 Q Is that something that you would report to
14 Agricredit about, if a dealer had too many pieces out
15 on demo?
16 A Yeah. That would come through the audit
17 report, yeah. Final audit report.
18 Q Okay. Did Agricredit, prior to August of
19 2007, ever instruct you to do a double check on
20 equipment because of excessive use as a demo?
21 A What do you mean "a double check"?
22 Q Did Agricredit ever get back to you and
23 say, "We're noticing on your monthly reports here
24 that this one piece of equipment is being out on demo
25 quite a few months in a row. Would you check and

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1 make sure it's really on demo"?
2 A Yeah, that would have been -- that would
3 have been normal, you know, procedure, yeah.
4 Q Would that be Kevin Peters that would
5 contact you about that or somebody else?
6 A Well, probably -- it probably -- you know,
7 it may have -- may have come down through him, but it
8 probably would have been Tammy Rafferty that --
9 Q Going back to -- when -- did you have more
10 than one conversation with Tom Lewis about the fact
11 that he wasn't paying for these tractors that are
12 listed on Exhibit No. 5 that have been sold to
13 customers and not --
14 A You mean after I found out in August?
15 Q Yeah.
16 A Yeah. Oh, yes. Numerous.
17 Q Did you? And what would he tell you? You
18 said one time he said -- just tell me how -- what he
19 told you.
20 A Well, you know, when we finally got -- in
21 prior months, probably in July, some of this stuff
22 had been sold. When we showed up in August and
23 confronted him on it that we -- you know, that we
24 knew that this -- you know, the customers had told us
25 that they paid for them, he broke down and cried, to

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1 be honest with you. I mean out there in the lot.
2 And he admitted to it.
3 Q How did you know that it had been sold and
4 not paid for if he -- if --
5 A Well, I'd contacted the customers.
6 Q How would you know to contact the customer?
7 That's what I'm driving at.
8 A Because he'd give me the information.
9 Q Who?
10 A Tom Lewis. Tom Lewis give me the
11 information that -- he'd say, "Well, this is out to,"
12 you know, whoever. And, "This is where it's at and
13 this is the phone number."
14 Q Oh, okay. So he would give you --
15 A So I either went out and knocked on their
16 door or, you know, called them and they'd say, "Yeah,
17 I paid for it," you know, and then we confronted him
18 and then started going down each item, and, you know,
19 then he admitted to -- he probably admitted to some
20 that we didn't even know about. You know, they were
21 off the lot, but we didn't know that they had been
22 sold and unpaid at that point when I...
23 Q When he initially told you to go to the
24 customer, did he initially tell you that the customer
25 hadn't paid for them?

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1 A I think what it was -- some of them they
2 were waiting for financing; some of them they just
3 showed as demo, maybe on a loan. He had all kinds of
4 smoke and mirrors that he threw at us. I mean, you
5 know, switching tractors from customer to customer
6 and, you know, shuffling the information to try to
7 keep us off track.
8 Q But when you finally confronted him in
9 August about the fact that you had talked to the
10 customers, that's when he broke down?
11 A Right.
12 Q Prior to that, had he told you different
13 stories about why it is that Agricredit hadn't been
14 paid, meaning the customer was still looking for
15 financing?
16 A Yeah. It would be -- yeah, they were
17 looking for financing, they hadn't made up their
18 mind, they were waiting on -- I mean, there was a
19 mechanical problem with it or, you know...
20 Q And by August of 2007, did you learn that
21 those stories were not true?
22 A Yes.
23 Q So he broke -- you say he broke down and
24 cried. And then what did he say? Did he tell you
25 how he was going to make it good?

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1 A Oh, yeah. He came up with a plan of he was
2 going to -- he had all this equipment he was going to
3 sell and how much he was going to get out of it and
4 -- you know, he was going to -- he give us a schedule
5 of what he was going to do, but it didn't -- I mean,
6 you know, within 30 days, but none of it ever panned
7 out.
8 Q Did you make any agreements with him about
9 how to take care of these items that Agricredit had
10 not been paid for?
11 A Well, of course, we asked him for our money
12 and how he was going to pay for it, and that's when
13 he came up with this list of equipment he was going
14 to sell and what he was going to do, but as far as an
15 agreement, no.
16 Q Oh. You mean he came up with a list of
17 equipment that was not financed by Agricredit that he
18 was going to sell, that he was going to --
19 A Yeah, equipment that -- yeah, he'd have
20 some cash in, yeah, right.
21 Q Was that a written list that he gave you of
22 what he was going to sell?
23 A I think so.
24 THE WITNESS: I think he did, didn't he,
25 Bill?

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1 MR. SHORE: He did.
2 THE WITNESS: Because I think, actually,
3 that day -- I think he did it all that day that --
4 actually, the day -- I think you were there the day
5 he cried, weren't you?
6 Q (BY MR. REID) Do you happen to have a copy
7 of that anywhere?
8 A I'm sure there's one somewhere, but --
9 MR. SHORE: I know I have one.
10 Q (BY MR. REID) So he came up with -- his
11 way of curing the sales out of trust was to sell
12 other equipment that wasn't financed by Agricredit
13 and then use that money to pay Agricredit?
14 A Yeah. Yeah, that's --
15 Q That's what he was going to do?
16 A Yes. Sorry. I'm mumbling. You can't hear
17 the rocks. Yeah. Yes, that's correct.
18 Q At least when he first made that proposal
19 to you, were you willing to go along with it?
20 A I think what -- I don't recall. You know,
21 I -- I just don't recall.
22 Q Did you have conversations with anybody
23 back in Des Moines about what to do about this?
24 A Yes.
25 Q And who would that be?

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1 A Kevin Peters.
2 Q Okay. What did he tell you?
3 A "Collect the money." And I would have
4 relayed that information, you know, of how he was
5 going to try to pay it, and, of course -- I mean,
6 that's the -- if he could sell the equipment, of
7 course, that would have been the easiest way for us
8 to recoup our money. I mean --
9 Q But that obviously didn't happen.
10 A It didn't happen. Some of it did, but
11 everything that he said, no, did not, so...
12 Q Did he ever indicate to you that Bill Shore
13 had told him that he was going to step up and pay for
14 this?
15 A I don't recall that, no.
16 Q Did you ever make demand on Bill Shore to
17 pay for these, yourself?
18 A Personally, no.
19 Q So any demand that may have been made by
20 Agricredit to Bill Shore would have come from Des
21 Moines rather than you?
22 A Correct.
23 MR. REID: I think I'm about done, so let
24 me take one more quick break just to check with Bill
25 and see if there's something else that I may have

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1 missed, and if not, we can probably wrap it up.
2 (Recess.)
3 Q (BY MR. REID) Just a couple more questions
4 and then I'm done.
5 Are you aware of a McCormick tractor that
6 Tom Lewis purchased for himself but did not finance
7 through Agricredit, financed it through U.S. Bank?
8 A Yes.
9 Q And then -- do you know who he sold that
10 to, that tractor?
11 A Do you mean after he bought it or --
12 Q Yeah. After Tom Lewis bought it.
13 A No.
14 Q Our understanding was he made -- because
15 this would have been part of the inventory out
16 there -- that that was a tractor that he made a
17 couple payments on and then sold.
18 A It could have been. I can give you a
19 little story on that. He had that tractor out to his
20 ranch. Myself and Bob Lindhardt went out there,
21 because he said he was going to buy it. He
22 originally tried to get it financed through us,
23 through Agricredit, and, of course, with everything
24 that was going on -- this was in the middle of all
25 this -- of course, we said no. I mean, we didn't

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1 want anything to do with him. So we went out -- me
2 and Bob Lindhardt went out and drove that tractor
3 back on the lot.
4 Q Okay.
5 A Okay? And then sometime in the future,
6 within a week or ten days or, you know, a short time,
7 he came up with financing from an outside source,
8 another bank, U.S. Bank or Wells Fargo or something,
9 to, you know, pay us off and settle for the tractor,
10 and, as far as I knew, he still had it.
11 MR. REID: Okay. I think that's all the
12 questions I have.
13 EXAMINATION
14 BY MR. FULLER:
15 Q I just have a few. Greg, did Agricredit
16 provide financing to customers of Bear River?
17 A Yes.
18 Q On occasion? Is that normal? Or was it
19 normal for -- more normal for it to be -- these
20 purchases of equipment to be financed through banks
21 or other institutions around here?
22 A Well, some of both. The -- actually, the
23 purpose of us doing wholesale financing, to be honest
24 with you, is so we get the financing, the retail
25 financing. I mean, so we were always looking for

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1 that type of business, but sometimes it was done from
2 outside sources.
3 Q Okay. The items that were sold out of
4 trust, obviously none of those were done through
5 Agricredit.
6 A Correct.
7 Q Are you aware if some of the people who
8 were customers that received these items of equipment
9 sold out of trust, whether they went through banks or
10 other lending institutions and paid Bear River?
11 A You're asking if they -- if I was aware
12 that they got financing -- yes. Some of them did get
13 financing from -- in fact, I think most of them got
14 their financing from outside sources.
15 Q Okay. And how are you aware of that? How
16 is it you know that?
17 A Customers would have told me when we
18 contacted them.
19 Q Did you confront Mr. Lewis about that
20 particular -- that information concerning that he had
21 been paid, you were aware he was paid, but that
22 Agricredit had not been paid?
23 A Yes, I did.
24 Q And what was his response?
25 A Didn't have the money. He spent it

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1 elsewhere.
2 Q Did you discuss that particular problem
3 with Mr. Shore?
4 A Yeah. Actually, when Tom -- or when Bill
5 came down and I met him on the lot that day, yes, we
6 did.
7 Q Was that the day that he broke down?
8 A Yes.
9 Q Speaking of Mr. Lewis.
10 A Mr. Lewis.
11 Q Not Mr. Shore.
12 I'm referring you to my copy of Deposition
13 Exhibit No. 10. It says it is the McCormick -- it
14 has on it "Remittance Form." Could you explain a
15 little bit about how that document came to be in your
16 possession, at least temporarily?
17 A This is a form that Tom Lewis -- and I
18 believe Bill was at that meeting that day that we sat
19 down and listed -- Tom listed all the equipment that
20 was sold out of trust that he owed us for and the
21 amounts and any discounts that would have been
22 available from the dealerships, any trades that were
23 involved to come up with these various amounts, and
24 then I would have written in the names down the side
25 as we went through them on who the customers were.

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1 Q Was the form used to show that Bear River
2 had actually paid this, or was it just a convenience?
3 A It was just a convenience. It was just a
4 -- I think it was just a convenient form so he
5 could -- you know, so he -- I think Tom did it so he
6 could net out all the figures, you know, add up all
7 the discounts and what his net amount was going to
8 be.
9 Q Okay.
10 A You know, like, rather than asking for 257
11 over here, he was saying, "Well, I'm only going to
12 owe you 228 by the time this all was done." So it
13 was more of a convenience for him.
14 Q What you're referring to is the total
15 amount under the column "Invoice Amount," correct?
16 A Correct.
17 Q That says $257,823?
18 A Right.
19 Q And on the far right column, where it says
20 "Net Amount Paid," there is a figure, $228,060.06.
21 Is that what you're referring to as being what
22 Mr. Lewis thought he would owe after all discounts
23 had been applied?
24 A Correct.
25 Q Does this in any way reflect that Mr. Lewis

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1 had actually paid this, in your mind?
2 A No. No.
3 Q Did he pay it?
4 A No, he hasn't. Did not. If he had, there
5 would have been -- there should have been a check
6 amount -- or check number and check amount and a copy
7 of the check with it, so...
8 Q And those items are blank on that form?
9 A Correct.
10 Q You indicated in some of your testimony
11 that there was an occasion where equipment had been
12 moved back onto the lot when you came to audit it; is
13 that --
14 A Yes, that's correct.
15 Q And tell us about that. Tell us what was
16 taking place there, to your knowledge, with regards
17 to moving equipment back onto the lot that ultimately
18 was found to be sold out of trust.
19 A Well, it was a way of -- Tom's way of
20 hiding what was going on. You know, if the equipment
21 had been off for extended periods -- he was
22 apparently aware enough that it was off for extended
23 periods that we would go checking, so he would bring
24 it back periodically, you know, to satisfy our needs.
25 Q And the method he might have used to bring

1 equipment back would have been what?
2 A Well, telling the -- the customers told me
3 that he used the -- told them that he needed a
4 warranty update or there was a re-call on it or
5 something, they needed to replace a switch or, you
6 know, bring it in for something, you know, for some
7 reason.
8 Q When did this all come to a head when you
9 finally determined that these items had been sold out
10 of trust and that Agricredit had not been paid?
11 A It was like July, August time frame of
12 2007.
13 MR. FULLER: That's all the questions I
14 have.
15 FURTHER EXAMINATION
16 BY MR. REID:
17 Q Just one. Did Tom Lewis ever admit to you
18 that he lied about a tractor being out on demo when
19 it really wasn't?
20 A After the fact, yes. Yes.
21 MR. REID: Thank you.
22 (Whereupon the taking of the deposition was
23 concluded at 11:36 a.m.)
24 * * * *
25

STATE OF IDAHO)
) ss.
COUNTY OF FRANKLIN)

GREG BRIGGS deposes and says: that he is the witness referred to in the foregoing deposition, taken February 23, 2009; that he has read the same and knows the contents thereof; that the same are true of his own knowledge.

_____
GREG BRIGGS

SUBSCRIBED and SWORN to before me this _____ day of _____, 2009.

_____
Notary Public
Residing at _____

My commission expires:
_____

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

I, RENEE L. STACY, Certified Shorthand Reporter, Registered Professional Reporter and Notary Public for the State of Utah, certify:

That the foregoing deposition of GREG BRIGGS was taken before me pursuant to Notice at the time and place therein set forth, at which the witness was put on oath by me;

That the testimony of the witness and all objections made at the time of the examination were recorded stenographically by me and were thereafter transcribed;

That the foregoing deposition is a true record of the testimony and of all changes made by the witness and of all objections made at the time of the examination.

I further certify that I am neither counsel for nor related to any party to said action nor in anywise interested in the outcome thereof.

IN WITNESS WHEREOF, I have subscribed my name and affixed my seal this 26th day of February, 2009.

_____
RENEE L. STACY, CSR, RPR
Notary Public in and for the
County of Salt Lake, State of Utah

My Commission Expires:

November 9, 2011

CORRECTIONS

Deposition of: GREG BRIGGS
Taken: February 23, 2009
Case Name: McCormick vs. Bear River Equipment
Case No: CV-08-327

PAGE	LINE	CORRECTION	REASON

SIGNATURE _____ DATE _____

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JAMES G. REID, ISB #1372
LAURA E. BURRI, ISB #3573
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455 S. Third, P. O. Box 2773
Boise, Idaho 83701-2773
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Attorneys for Defendants

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF FRANKLIN

MCCORMICK INTERNATIONAL USA, INC., a corporation Plaintiff, vs. BEAR RIVER EQUIPMENT, INC., a corporation, WILLIAM R. SHORE an individual; and ROBERTA SHORE, an individual, Defendants.	)	Case No. CV 08-327 NOTICE OF DEPOSITION DUCES TECUM OF GREG BRIGGS

TO: **GREG BRIGGS:**

PLEASE TAKE NOTICE that Defendant will take the testimony, on oral examination, of Greg Briggs, before an officer qualified to administer oaths, on the 23rd day of February, 2009, at 9:30 a.m. at the offices of Steven R. Fuller, 24 N.

State Street, Preston, Idaho.

YOU ARE FURTHER COMMANDED to bring with you, and then and there produce, the following:

1. All documents, correspondence, emails, reports, audit material, notes, memorandums, accounting materials, audit papers, schedules, inventory control papers and any other documents evidencing your duties relating to Bear River Equipment located in Preston, Idaho.

2. All manuals, training materials, written procedures and guidelines relating to dealer audits furnished by Agri-Credit and/or McCormick.

DATED this 5 day of February, 2009.

RINGERT LAW CHARTERED

By _____
James G. Reid

CERTIFICATE OF SERVICE

I hereby certify that on the 12 day of February, 2009, a true and correct copy of the foregoing was served upon all parties listed below by:

(✓) U. S. mail, postage prepaid
( ) hand delivery
( ) express mail
( ) facsimile

Steven R. Fuller
Steven R. Fuller Law Office
24 North State
P.O. Box 191
Preston, ID 83262

Depo Max
333 S. Rio Grande St
Salt Lake City, UT 84101

James C. Reid

CORPORATE DEALER'S RESOLUTION CERTIFICATE

I have compared the following resolution with a resolution adopted by the Board of Directors of

Bear River Equipment, Inc.
(full name of company)

a company incorporated, organized and existing under the laws of the State of Idaho

having its principal place of business at 720 N. State Street
(address)

Preston (town) Idaho (state)

at a regular meeting thereof a quorum being present on the 22 day of March, 2005 as recorded in the minutes books of the Company and I, as Secretary of the said Company, hereby certify that the same is a true, correct and complete copy thereof and that the same has not been rescinded.

"BE IT RESOLVED That the Company shall enter into:

a Retail Financing Agreement and related Recourse Supplement, Wholesale Financing Plan and/or an Inventory Security Agreement, Terms Supplement and/or Collateral Schedule with Agricredit Acceptance LLC ("AAC") on the form now in use by AAC for such purpose and

William R. Shore (name) President (title)

shall be and is hereby authorized to execute such documents and other related documents on behalf of and in the name of the Company

"BE IT FURTHER RESOLVED that any of the following named officers of the Company

NAME William R. Shore President

NAME [signature] Vice President

NAME Roberta S. Shore Secretary

NAME [signature] Treasurer

NAME

or that any of the following named employees of the Company who are not officers thereof

NAME _____ (Position) _____

NAME _____ (Position) _____

shall be and hereby are authorized to execute on behalf of and in the name of the Company any and all agreements, assignments, transfers, endorsements, security documents, negotiable instruments or other documents necessary to the conduct of the affairs of the Company and any and all other documents to which AAC is a party or in respect to or concerned with the wholesale and retail finance or lease plans of the said AAC. The powers vested in the said named persons shall continue in full force and effect until written notice of rescission or modification thereof has been received by AAC and the Company shall save harmless AAC for any loss suffered or liability incurred by it in reliance on this resolution after revocation or termination by operation of law or otherwise, in the absence of such notice."

Witness my hand and seal of Bear River Equipment, Inc.
(name of company)

this _____ day of _____ 2005

(Corporate Seal) [signature] Secretary
Roberta S. Shore

AAC 2/2/05

DEPOSITION EXHIBIT
2
Briggs
PENGAD 800-631-6989

Inventory Security Agreement

Agricredit

de lage landen ™

Agricredit Acceptance LLC

DEPOSITION EXHIBIT
3
Briggs

PENGAD 800-631-6989

AAC 2/2/05

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INVENTORY SECURITY AGREEMENT

THIS INVENTORY SECURITY AGREEMENT ("Agreement") is made by and between Bear River Equipment, Inc. having its principal place of business and chief executive office at 720 N. State Street, Preston, ID 83263 ("Debtor") and AGRICREDIT ACCEPTANCE LLC having an office at 8001 Birchwood Court, P. O. Box 2000, Johnston, IA 50131-0020 (hereinafter called "Secured Party").

Debtor engages in the business of buying, selling and generally dealing in goods of various types at retail, and from time to time may desire to finance the acquisition of goods and for such purpose to obtain from Secured Party such extensions of credit as Secured Party in its sole discretion may decide to grant. Debtor acknowledges receipt of a copy of this Agreement.

In consideration of the mutual promises, covenants and conditions of this Agreement, the parties hereto hereby agree as follows:

1. Debtor represents that it is a (check one) ☒corporation ☐general partnership ☐limited partnership ☐limited liability company ☐ sole proprietorship; and the extension of credit secured and to be secured by this Agreement is for business or commercial purposes.

   Debtor's principal place of business and chief executive office is set forth above. The following are the Debtor's business and warehouse addresses (if any) where any of the Collateral (as hereinafter defined) is now or may hereafter be located, in addition to the address set forth in the first paragraph of this Agreement (attach additional sheet if necessary):

   _____

   _____

   _____

   If Debtor is a partnership, the following are the names and addresses of all partners (attach additional sheet if necessary):

   _____

   _____

   _____

   If Debtor is a partnership, all Obligations (as hereinafter defined) shall remain in force and shall apply to and be binding upon all general partners at the time this Agreement is signed and any persons who subsequently become general partners of Debtor, notwithstanding any changes in the persons comprising the partnership. The term "Debtor" shall include any successor partnerships.

   Debtor agrees to notify Secured Party, not less than thirty (30) days before such change is effective, of any proposed change in its principal place of business or chief executive office, proposed additions or discontinuance of other locations from which it conducts its business or where any of the Collateral is located, and any proposed change in name, identity, form of ownership or management (including, if Debtor is a partnership, any proposed change in the partners comprising the partnership). If any such change would, in the opinion of Secured Party, adversely affect the security interest granted herein or otherwise adversely affect the interests of Secured Party under this Agreement, Secured Party, in its sole discretion, may notify Debtor of corrective action Debtor will be required to take including, without limitation, executing and filing any financing statements evidencing such change. Debtor shall promptly comply with any such notification in accordance with its terms.

If Debtor is a corporation or other business entity, Debtor represents that it is duly organized, existing and in good standing in all states in which it is doing business, and the execution, delivery and performance of this Agreement are within Debtor's powers, have been duly authorized, and are not in contravention of law or the terms of Debtor's charter or articles of incorporation (or other organizational agreements or documents), bylaws or any indenture, agreement or undertaking to which Debtor is a party, or by which it is bound.

2. The term "Collateral" as used herein shall mean all of the following present and after-acquired property:

   a) All of the Debtor's present and after-acquired inventory, (including without limitation all present and after-acquired new and used inventory of every type and kind including but not limited to all new and used tractors, combines, farm implements, loaders, hay equipment, skid loaders, excavators, and farm, materials handling and industrial equipment) wherever located, set forth on one or more schedules ("Collateral Schedules") which, by specific reference to this Agreement and upon execution by Secured Party and Debtor (or Secured Party on behalf of Debtor), become subject to all the terms and conditions contained herein;

   b) All additions to, replacements of and substitutions of the inventory referred to in the Collateral Schedules and all accessories, accessions, parts and equipment now or hereinafter affixed thereto, and all returns and repossessions thereof;

   c) All reserves, however created, of Debtor in the possession or control of Secured Party;

   d) All of Debtor's rights to any rebates, discounts, credits, factory holdbacks and incentive payments which may become due to Debtor by the manufacturer or distributor with respect to any of the items set forth in subparagraphs (a) and (b) above; and

   e) All proceeds of every item, type or kind from the items set forth in subparagraphs (a), (b), (c) and (d) above, including, but not limited to, cash, investment property, money, documents, instruments, accounts, chattel paper, goods, contract rights, general intangibles, insurance proceeds payable by reason of loss or damage with respect thereto, and trade-in inventory and equipment.

   The items referred to in subparagraphs (a) and (b) are collectively referred to in this Agreement as "Inventory". The Collateral is free and clear of all liens, security interests and encumbrances except for the security interest granted herein to Secured Party. Upon execution of a Collateral Schedule, any and all additional or specific terms and conditions therein contained shall be, with respect to such Collateral Schedule, incorporated herein and shall have the same force and effect as if such terms and conditions are expressly set forth herein. The terms and conditions contained herein shall apply to each Collateral Schedule, properly executed and made subject to such terms and conditions, as if a separate security agreement identical to this Agreement were executed for each Collateral Schedule. Additional Collateral Schedules may be executed from time to time by the Debtor and Secured Party, and if such Collateral Schedules refer by date and contracting parties to this Agreement, such Collateral Schedules shall be deemed to be executed in conjunction herewith and to be subject hereto regardless of the date upon which such Collateral Schedules are executed.

3. Secured Party will announce to Debtor from time to time its financing plans (each a "Wholesale Financing Plan") as to the amounts that it is willing to loan to finance the acquisition of Inventory and the amounts that it is willing to loan for other purposes, the terms of any such financing and the charges, interest, service charges, repayment terms and conditions thereof and any related terms or conditions. Wholesale Financing Plans may be changed from time to time by Secured Party. When Debtor wishes to obtain financing from Secured Party, Debtor shall request such financing in accordance with the procedures set forth in the Wholesale Financing Plans then in effect. If

Secured Party agrees to provide financing requested by Debtor, such financing shall be on such terms and subject to such conditions as may be established in accordance with this Agreement and the applicable Wholesale Financing Plan or as otherwise agreed in writing by Secured Party and Debtor.

As part of an application for such extensions of credit, at the request and direction of Secured Party, Debtor shall execute and deliver, or provide for the execution and delivery to Secured Party, any and all further writings that Secured Party deems necessary or desirable to accomplish the purposes of this Agreement, including, but not limited to, security agreements, financing statements and any amendments thereto. Debtor shall pay or reimburse Secured Party for all costs in connection with the filing and perfection of the security interest granted herein and therein.

4. Debtor hereby grants to Secured Party a security interest in the Collateral to secure the performance and payment of all indebtedness and obligations of Debtor to Secured Party of every kind and character, whether now existing or hereafter incurred, arising under this Agreement or any other existing or future agreement between Debtor and Secured Party including, but not limited to, any Wholesale Financing Plan, direct or indirect, absolute or contingent, and whether any such indebtedness or obligation is from time to time reduced and thereafter increased or entirely extinguished and thereafter reincurred, including, but not limited to, any sums advanced by Secured Party in the performance of Debtor's obligations hereunder and for license fees, insurance and repairs, and attorneys' fees and other charges and expenses incurred in the collection of such indebtedness or obligations or any part thereof, all obligations of performance hereunder as well as under any other agreement (whether now or hereafter in effect) between Debtor and Secured Party, and all obligations of payment hereunder as well as under any other agreement (whether now or hereafter in effect) between Debtor and Secured Party (all of the foregoing is collectively referred to as the "Obligations").

5. Debtor hereby agrees to pay the amounts described in Paragraph 2(d) above to Secured Party as soon as the same are received for application to the Obligations. Until paid to Secured Party, Debtor shall hold such amounts in trust for the Secured Party. Debtor hereby authorizes Secured Party to collect any such amounts directly from the manufacturer or distributor, and, upon request of Secured Party, will instruct the manufacturer or distributor to pay such amounts directly to Secured Party.

6. If applicable, Debtor shall, upon the request of Secured Party, deliver to Secured Party the certificate of title, certificate of origin or manufacturer's statement of origin (or similar documents) issued for each item of Collateral, together with such proper notations, applications, assignments or endorsements as may be necessary or appropriate to create, preserve or perfect Secured Party's security interest in the Collateral, and Secured Party shall have the right to hold the same until such items of Inventory are sold and to have its lien or security interest noted thereon. Debtor shall also execute and deliver to Secured Party such financing statements and other writings and pay all costs of lien searches and filing financing statements and other writings in all public offices requested by Secured Party from time to time, and do such other things with respect to the Collateral as Secured Party may request.

7. Debtor shall keep all of the Collateral only at its place(s) of business referred to in paragraph 1 above. The possession of Inventory by Debtor is solely for the purpose of procuring the sale or exchange or lease to buyers in the ordinary course of Debtor's business. Debtor shall not otherwise consume, assign or transfer any Collateral without the prior written consent of Secured Party. The provisions of this Agreement granting a security interest in proceeds shall not be construed to mean

that Secured Party consents to any other sale or disposition of the Collateral. The Secured Party is hereby irrevocably authorized to enter the Debtor's premises and to examine the Collateral at any time, whether or not a default has occurred.

8. Debtor shall:

   a) Not use (except for demonstration for sale), rent, lease, transfer or dispose of Collateral except as herein provided or as provided in any Wholesale Financing Plan between Debtor and Secured Party, nor permit any lien, encumbrance or security interest upon the Collateral except that of Secured Party;

   b) Keep all Collateral in good order, repair and operating condition;

   c) Pay immediately all taxes, expenses, assessments and charges which may now or hereafter be levied or assessed against the Collateral; and

   d) Pay Secured Party the amount of any extension of credit according to the terms of the applicable Wholesale Financing Plan, Wholesale Financing Request and Agreement, invoice and other writings evidencing such extension of credit, including, but not limited to, any required curtailments, all without regard to any manufacturer or distributor rebate, credit, holdback or discount. Notwithstanding the foregoing, Debtor agrees to pay Secured Party the amount of any extension of credit on each item of Inventory financed hereunder immediately upon the sale thereof in a form and manner satisfactory to Secured Party. Until the proceeds of such sale have been paid to Secured Party, Debtor shall hold the entire sale proceeds, in the same form as received, in trust for Secured Party, and, if requested by Secured Party at any time after the occurrence of an Event of Default, Debtor will hold such sale proceeds separate and apart from Debtor's funds and goods. Debtor shall not sell, assign, grant a security interest in or otherwise dispose of all or any part of such proceeds. Secured Party shall apply all amounts so received from Debtor toward the payment of the Obligations in such order of application as Secured Party may determine. Secured Party in its sole discretion may authorize the Debtor to pay Secured Party on a scheduled payment program ("Scheduled Payment Program") for extensions of credit for all or a portion of the Inventory and Secured Party may discontinue said Scheduled Payment Program at any time. If Secured Party discontinues any such Scheduled Payment Program, notwithstanding the provisions of any other writing evidencing the indebtedness arising out of such extension of credit, Debtor agrees to pay as provided above in this paragraph 8(d).

9. Debtor assumes all risk of physical loss or damage to the Collateral. Debtor shall keep all Collateral insured against risks covered by standard forms of fire, theft and extended coverage insurance and such other risks as may be required by Secured Party in such amounts and under policies issued by such insurance company or companies as are satisfactory to Secured Party. Secured Party shall be named as a lienholder, lender loss-payee and/or as co-insured with payment for any loss to be made to Secured Party as lienholder or co-insured. Secured Party is hereby authorized, but not required, to act as attorney-in-fact for Debtor in obtaining, adjusting and settling any insurance claim thereunder, and endorsing any checks or drafts drawn by insurer. Debtor shall promptly remit to Secured Party in the form received, with all necessary endorsements, any proceeds of such insurance which Debtor may receive. Secured Party may apply any proceeds of insurance which may be received by it toward payment of the Obligations, whether or not due, in such order of application as Secured Party may in its sole discretion determine. Should Debtor fail to obtain such insurance, Secured Party may (but shall not be required to) procure the same at the cost of Debtor. Debtor shall furnish to Secured Party certificates evidencing the insurance coverages required herein which certificates shall require thirty (30) days' notice to Secured Party prior to cancellation or diminution in coverage. Secured

Party shall have no liability for any loss which may occur by reason of the omission or lack of coverage of any such insurance.

10. Debtor shall at all times keep complete and accurate records of its business and shall permit representatives of Secured Party at any time to inspect and make abstracts from Debtor's books and records with respect to the Collateral, and Debtor shall, upon demand, furnish Secured Party such information regarding Debtor's business and financial condition as Secured Party may reasonably request. In addition, Debtor shall furnish to Secured Party as soon as available and in any event within ninety (90) days after the end of each fiscal year a copy of the financial statements of Debtor and each of its affiliates (including a balance sheet and statement of income and retained earnings) for such fiscal year, prepared in accordance with generally accepted accounting principles, except as otherwise permitted by Secured Party, and, if requested by the Secured Party, Debtor shall furnish to Secured Party as soon as available and in any event within thirty (30) days after the end of each calendar quarter a copy of the financial statements of Debtor and each of its affiliates (including a balance sheet and statement of income and retained earnings) for such quarter, prepared in accordance with generally accepted accounting principles, except as otherwise permitted by Secured Party. Secured Party is hereby authorized to request confirmation of the information provided pursuant to this paragraph 10 directly from any third party having dealings with Debtor. Debtor shall promptly transmit to Secured Party all information that it may have or receive with respect to the Collateral which might in any way affect the value of the Collateral or Secured Party's right or remedies with respect thereto.

11. Debtor hereby grants to Secured Party (by any agents or employees of Secured Party) a Limited Power of Attorney (coupled with an interest) under which Secured Party may execute on behalf of Debtor any Collateral Schedules, trust receipts, notes, chattel paper, security agreements, financing statements, Wholesale Financing Requests and Agreements and amendments thereto, or other writings in connection with this Agreement as attorney-in-fact for Debtor. Under this Limited Power of Attorney, Secured Party is authorized to execute any such writings manually or by affixing a mechanical facsimile. Secured Party will furnish Debtor with a copy of each writing executed under this Limited Power of Attorney. This Limited Power of Attorney may be revoked by Debtor only by written notice to Secured Party and no such revocation shall affect any writing theretofore executed by Secured Party pursuant to such Limited Power of Attorney.

12. The following shall constitute an event of default ("Event of Default") under this Agreement:

    a) Any breach or failure of Debtor to pay, observe or perform any of the Obligations when due;

    b) Misrepresentation by Debtor to Secured Party in connection with the business or financial condition or organizational structure of Debtor or any misrepresentation relating to the Collateral;

    c) Death, declaration of incompetence or dissolution or merger or change of name by or of Debtor or any guarantor or surety of the Obligations;

    d) Any guarantor or surety of the Obligations terminates such guaranty or suretyship with respect to Debtor or breaches any of the terms, promises, warranties, or representations contained in any guaranty or surety agreement;

    e) The Debtor or any guarantor or surety of the Obligations shall make an assignment for the benefit of creditors, file or have filed against it a petition in bankruptcy, apply to or petition any tribunal for the appointment of a custodian, receiver, receiver-manager, or trustee for Debtor (or any guarantor or surety) or any substantial part of its or their assets, or shall commence any proceeding under any bankruptcy, reorganization, arrangement, readjustment of

debt, dissolution or liquidation law or statute of any jurisdiction, or if there shall have been filed any such petition or application, or any such proceeding shall have been commenced against any such person or entity; or any such person or entity by any act or omission shall indicate its consent to, approval of or acquiescence in any such petition, application or proceeding or order for relief or such appointment of a custodian, receiver or trustee;

f) Any material reduction in the value of the Collateral or any act of Debtor which imperils the prospect of full performance or satisfaction of the Obligations;

g) Occurrence of loss, theft, damage or destruction of the Collateral;

h) Debtor shall have concealed, removed, or permitted to be concealed or removed, any part of Debtor's assets, so as to hinder, delay or defraud any of Debtor's creditors, or made or suffered a transfer of any of Debtor's assets which transfer would be fraudulent under any bankruptcy, insolvency, fraudulent conveyance or similar law, or shall have made any transfer of Debtor's assets to or for the benefit of a creditor at a time when other creditors similarly situated have not been paid, or shall have suffered or permitted, while insolvent, any creditor to obtain a lien upon any of Debtor's property through legal proceedings or distraint;

i) Debtor shall have voluntarily or involuntarily lost any franchise, permission, license or right to sell or deal in any product line of Inventory;

j) Breach by Debtor of any provision of this Agreement or of the terms of any Wholesale Financing Plan or any other agreement between Debtor and Secured Party or its affiliated entities, whether now existing or hereafter made;

k) Debtor or Debtor's agent gives or furnishes to Secured Party a false statement, representation or warranty in a material respect or if such statement, representation or warranty is true when given, then if such statement, representation or warranty is determined to be false; or

l) The occurrence or nonoccurrence of any event which causes Secured Party to deem itself insecure.

m) The Collateral or any part thereof is abandoned; or

n) The Debtor or any guarantor/surety becomes in default of the payment of any indebtedness owed to any third party; or

o) A judgment is issued on any claim against the Debtor or any guarantor/surety; or

p) Any part of the Collateral is seized or taken in execution or any other process of any court becomes enforceable against the Debtor or a distress or analogous process is levied upon the Collateral or any part thereof; or

q) The Debtor suspends business or threatens to cease or suspend business; or

r) The Debtor makes or agrees to make a bulk sale of assets; or

s) Secured Party determines, in its sole discretion, that the Collateral, or any other collateral given to Secured Party to secure the Obligations, or the Debtor's or any guarantor's net worth has decreased in value.

13. Upon the occurrence of an Event of Default, Secured Party shall have, in addition to any and all rights under the UCC, the option to terminate any Wholesale Financing Plan or similar agreement and to declare the Obligations immediately due and payable without notice or demand, notwithstanding the provisions of any writing evidencing the same to the contrary; and Secured Party shall have the right to take immediate and exclusive possession of the Collateral and every part thereof, wherever it may be found, and also may enter any of the premises of the Debtor, with or without process of law, wherever the Collateral may be, or is supposed to be, and search for the same, and if found, to take possession of, and remove, sell, and dispose of the Collateral, or any

part thereof, in accordance with the UCC. Debtor hereby waives any right to judicial proceedings prior to Secured Party's exercise of its afore-mentioned rights of repossession. As to accounts constituting proceeds of the Collateral, Secured Party shall have the right (but shall not be obligated to) in its own name, or in the name of Debtor, to notify all account obligors and to demand, collect, receive, give receipt for, sue, compromise and give acquittance for, any and all amounts due on such accounts, and to endorse the name of the Debtor on any commercial paper or instrument given as full or partial payment thereon. Debtor shall, if Secured Party so requests after the occurrence of an Event of Default, assemble the Collateral and make it available to Secured Party, at Debtor's expense, at a place designated by Secured Party reasonably convenient to both parties. Debtor shall pay all costs of Secured Party incurred in the repossession of the Collateral and the enforcement and collection of the Obligations, including reasonable attorneys' fees and expenses of enforcement and collection (including without limitation any costs and expenses of a receiver or receiver-manager). All of such costs shall be considered Obligations under this Agreement. Any notice of intended disposition of any of the Collateral required by law shall be deemed reasonable if such notice is given at least ten (10) days before the time of such disposition. Any proceeds may be applied by Secured Party to the payment of the reasonable expenses of retaking, holding, preparing for sale, selling and the like, including reasonable attorneys' fees and legal expenses, and any balance of such proceeds may be applied by Secured Party toward the satisfaction of the Obligations in such order of application as Secured Party may in its sole discretion determine. Any surplus shall be paid to Debtor (or to such other person entitled at law), and Debtor agrees to pay any deficiency immediately upon demand. In addition to all of the foregoing rights, upon the occurrence of an Event of Default, Secured Party may, without notice to anyone, hold, appropriately apply, or set off any and all reserves, moneys and credits or other property of or belonging to Debtor which is or comes into the possession of Secured Party, its affiliates or subsidiaries, against any Obligations whether or not then due and payable. Debtor further agrees that if Secured Party accelerates payment of the Obligations after the occurrence of an Event of Default, any employee or authorized representative of Secured Party may receive, open and dispose of Debtor's mail and execute, sign, collect, endorse and transfer in the name of Debtor notes, checks, drafts, or other instruments for the payment of money and receipts, certificates of origin and applications for certificates of title or other documents necessary to evidence, perfect and realize upon the Collateral and the Obligations. In connection with the enforcement of its security interest hereunder, Secured Party may take possession of any goods installed in, affixed to or otherwise in or upon the Collateral at the time of repossession, and hold such goods for Debtor at Debtor's risk without any liability on the part of Secured Party. Debtor agrees to notify Secured Party within forty-eight hours after repossession of the Collateral of any such other goods claimed by Debtor, and failure to do so shall hereby release Secured Party from any liability or loss or damage with respect thereto.

The exercise by Secured Party of, or failure to so exercise, any of the foregoing rights, shall in no manner affect Debtor's liability to Secured Party on the Obligations. Secured Party shall be under no obligation or duty to exercise any of the powers hereby conferred upon it and it shall be without liability for any act or failure to act in connection with the collection of or the preservation of any rights hereunder. Secured Party shall not be obligated to take any steps necessary to preserve rights in any instrument or chattel paper against prior parties.

Rights and remedies provided for herein are cumulative and shall not limit rights or remedies otherwise available to Secured Party under any other agreement or applicable law.

14. It is understood and agreed, any law, custom or usage to the contrary notwithstanding, that Secured Party shall have the right at all times to enforce the covenants and provisions of this Agreement in strict accordance with the terms thereof, notwithstanding any conduct or customs on the part of Secured Party in refraining from so doing at any time or times; and further, that the failure of Secured Party at any time or times to enforce its rights under said covenants and provisions in

accordance with the same shall not be construed as having created a custom in any manner contrary to the specific terms and provisions of this Agreement or as having in any manner modified, altered or waived the same. Secured Party shall not be deemed to have waived any of its rights hereunder or under any other agreement, instrument or paper signed by Debtor unless such waiver be in writing and signed by Secured Party.

15. Debtor shall not assert against Secured Party any claim or defense Debtor may have against any seller of goods to Debtor.

16. This Agreement may be assigned by Secured Party but Debtor may not assign this Agreement without the prior written consent of Secured Party. All of the rights and privileges of Secured Party contained in this Agreement shall inure to the benefit of its affiliates, subsidiaries, representatives, employees, successors and assigns. All covenants, representation, warranties and agreements of Debtor in this Agreement are joint and several if Debtor is more than one and shall bind Debtor's personal representatives, executors, administrators, heirs, successors and permitted assigns.

17. This Agreement contains all of the understandings, promises and undertakings of the parties hereto concerning the subject matter hereof. All prior undertakings and agreements, oral or written, concerning the subject matter heretofore entered into between the parties hereto are merged herein. This Agreement may not be modified, altered or amended except by a further agreement in writing signed by the duly authorized representatives of Debtor and Secured Party. This Agreement will be supplemented by one or more Collateral Schedules executed as set forth herein.

18. The validity, enforceability and interpretation of this Agreement and any promissory notes taken, charges made and sums paid in connection herewith and pursuant to the Wholesale Financing Plans shall be governed by the laws of the State of Iowa, the state of the principal place of business of the Secured Party. The parties hereto agree that this Agreement is entered into and performable in part in Johnston, Polk County, Iowa. Secured Party and Debtor hereby irrevocably (a) submit and consent to the non-exclusive jurisdiction of the Iowa District Court for Polk County, Iowa and the United States District Court for the Southern District of Iowa for resolution of any dispute concerning this Agreement or the rights or obligations of the parties hereunder, (b) agree that any litigation commenced in Iowa in connection with this Agreement shall be venued in either the Iowa District Court for Polk County, Iowa or the United States District Court, Southern District of Iowa, Central Division, and (c) waive any objection it may have as to any such action or proceeding brought in such court or that such court is an inconvenient forum. Nothing herein shall limit the right of Debtor or Secured Party (or the rights of any permitted successor or assign of either) to bring proceedings against the other in the courts of any other jurisdiction wherein any assets of such other party may be located. Debtor agrees to reimburse Secured Party for reasonable attorneys' fees, out-of-pocket expenses and court costs incurred by Secured Party relating to the enforcement of this Agreement against Debtor. DEBTOR AND SECURED PARTY (EACH FOR ITSELF AND ITS PERMITTED SUCCESSORS AND ASSIGNS) HEREBY WAIVES TRIAL BY JURY IN ANY JUDICIAL PROCEEDING INVOLVING, DIRECTLY OR INDIRECTLY, ANY MATTER (WHETHER SOUNDING IN TORT, CONTRACT OR OTHERWISE) IN ANY WAY ARISING OUT OF, RELATED TO, OR CONNECTED WITH THIS AGREEMENT OR THE RELATIONSHIP ESTABLISHED HEREUNDER.

19. Any provisions of this Agreement found upon judicial interpretation or construction to be prohibited by law shall be ineffective to the extent of such prohibition, without invalidating the

remaining provisions hereof. Words and phrases herein shall be construed as in the singular or plural number, and as masculine, feminine, or neuter gender, according to the context.

20. Any notice which may or is required to be given pursuant to or in relation to this Agreement may be (a) personally delivered, (b) sent postage prepaid by ordinary United States mail (with confirmation of mailing evidenced by US Postal Service certificate of mailing) or by certified, express or registered United States mail or (c) sent by overnight courier of national reputation, in each case addressed or delivered, if to Debtor, to Debtor's address set forth above for the Debtor, and, if to Secured Party, to Secured Party's address set forth above for the Secured Party, or to such other address as may be later furnished in writing by the applicable party. All such notices shall be deemed given (x) on the date received, if personally delivered, (y) when mailed, if sent by mail, or (z) on the date sent, if sent by overnight courier.

21. All terms contained herein not otherwise defined shall have the meanings given to them in the Iowa Uniform Commercial Code as in effect from time to time ("UCC").

22. This Agreement and Collateral Schedule(s) are not valid or binding upon the parties hereto unless and until executed and accepted by an authorized representative of the Secured Party.

23. Regardless of the terms of any schedule payment financing program with Secured Party, if Secured Party determines after conducting an inspection of the Collateral, that the current outstanding indebtedness owed by Debtor exceeds the aggregate wholesale invoice price of such Collateral, Debtor shall immediately pay to Secured Party an amount equal to the difference between such outstanding indebtedness and the aggregate wholesale invoice price of such Collateral.

24. If any provision of this Agreement is or is found to be void or unenforceable by the law of any jurisdiction applicable to it, then such provision shall be severable from the remainder of this Agreement and shall be severed therefrom, and the remainder of this Agreement shall not be affected thereby.

25. No waiver by Secured Party of any default in the performance of any Obligation shall be deemed a waiver of any prior or subsequent default. In the event Secured Party obtains a judgment against Debtor for any sum secured hereby, the security interest granted hereunder shall not merge in the said judgment.

26. Secured Party may apply payments to reduce finance charges first and then principal, irrespective of Debtor's instructions. Further, Secured Party may apply principal payments to the oldest (earliest) invoice for the Collateral financed by Secured Party, but, in any case, all principal payments will first be applied to such Collateral which is sold, lost, stolen, destroyed, damaged or otherwise disposed of. The Secured Party's application of any payment is conditional and subject to review and reapplication until all Obligations are paid in full.

IMPORTANT: READ BEFORE SIGNING. THE TERMS OF THIS AGREEMENT SHOULD BE READ CAREFULLY BECAUSE ONLY THESE TERMS IN WRITING ARE ENFORCEABLE. NO OTHER TERMS OR

ORAL PROMISES NOT CONTAINED IN THIS WRITTEN CONTRACT MAY BE LEGALLY ENFORCED. YOU MAY CHANGE THE TERMS OF THIS AGREEMENT ONLY BY ANOTHER WRITTEN AGREEMENT.

IN WITNESS WHEREOF, the parties hereto have caused their name to be signed by their proper officers or representatives and their seals (if applicable) to be affixed.

Date: March 22, 2005

Bear River Equipment, Inc.
Debtor's Name

ATTEST (if the Debtor is a corporation):

Roberta S. Shore — Secretary
Roberta S. Shore — Title

By: William R. Shore — President
William R. Shore — Title

By: _____
Authorized Signature — Title

Note: If the Debtor is a corporation, the president or vice-president must sign and give their official title. If not, the signer(s) must state whether they are the owner or a general partner.

AAC 2/2/05

This Agreement is executed and accepted in Johnston, Iowa on behalf of Agricredit Acceptance LLC by its duly authorized representative this 25 day of Mar, 2005, which date shall constitute the effective date of this Agreement.

AGRICREDIT ACCEPTANCE LLC

By: _____
Authorized Signature Title

VP-INVENTORY FINANCE
RISK MANAGEMENT

AAC 2/2/05

Agricredit Acceptance LLC

COLLATERAL SCHEDULE

THIS COLLATERAL SCHEDULE executed by and between

Bear River Equipment, Inc.

having its principal place of business and chief executive office at 720 N. State Street, Preston, ID 83263 (hereinafter called the "Debtor") and Agricredit Acceptance LLC having an office at 8001 Birchwood Court, P. O. Box 2000, Johnston, IA 50131-0020 (herein after called the "Secured Party").

The Debtor acknowledges receipt of a copy of this Collateral Schedule.

The Debtor and the Secured Party entered into an Inventory Security Agreement effective as of March 22, 2005 (the "Agreement") which provides that by this reference to such Agreement and upon execution of this Collateral Schedule by the Secured Party and the Debtor (or by the Secured Party on behalf of the Debtor) the following shall become subject to a security interest in favor of the Secured Party and to all the terms and conditions contained in the Agreement (attach additional sheets if necessary):

All inventory, equipment, attachments, accessories or other goods now or hereafter purchased from or financed by Secured Party including any such items leased or rented by or to debtor and the proceeds thereof including equipment, goods, accounts, chattel paper, documents, instruments, cash, and rents.

Also included in the grant of the security interest are the items set forth in paragraphs 2(a), 2(b), 2(c), 2(d) and 2(e) of the Agreement with respect to the above Inventory.

The terms and conditions applicable to the financing of the purchase of the property hereinabove described shall be those set forth in the Wholesale Financing Plan applicable to such financing issued by the Secured Party, as more particularly described in paragraph 3 of the Agreement. This Collateral Schedule is not valid or binding unless and until executed and accepted by an authorized representative of the Secured Party. All terms contained herein and not otherwise defined shall have the respective meanings set forth in the Agreement.

IN WITNESS WHEREOF, the parties hereto have caused their names to be signed by their proper officers or representatives and their seals (if applicable) to be affixed.

Date: March 22, 2005

Bear River Equipment, Inc.
Name of the Debtor

By: William R. Shore — President
William R. Shore — Title

ATTEST (if the Debtor is a corporation):

Roberta S. Shore — Secretary
Roberta S. Shore — Title

By: _____
Authorized Signature — Title

(SEAL)

AAC 2/2/05

WHOLES[illegible]E FINANCING REQUEST AND AGRE[illegible]ENT

Dealer Code	Processing Date	Debtor Name & Address
0094196900	03/30/2005	BEAR RIVER EQUIPMENT INC. 720 N STATE STREET PRESTON, ID 83263, USA

The undersigned Debtor herein requests financing of Collateral in accordance with the provisions of the Inventory Security Agreement effective as of 03/25/2005 and related Collateral Schedule(s) in effect between Debtor and Agricredit Acceptance LLC d/b/a Agricredit Acceptance Company (Secured Party).

INVENTORY FINANCED. The Inventory financed under this Wholesale Financing Request and Agreement is as described in the following schedule :

New Used	Mfg Code	Model Number	Serial Number	Description	Seller's Invoice Number (New)	Amount Financed
N	MCC	F100-4Q	PHSCT07199	F100-4Q	25001366	29,316.63
N	MCC	MTX165	JJE3361597	MTX165	25001367	67,493.14
N	MCC	CX85	JJE2053753	CX85 XtraShift	25001368	34,259.94
N	MCC	CX75	JJE2051532	CX75 XtraShift	25001369	31,058.02
N	MCC	MTX165	JJE3361427	MTX165	25001370	63,003.31
Total Amount Financed for Processing Date						**225,131.04**

Debtor hereby promises to pay Secured Party the Total Amount Financed, plus interest, in accordance with the provisions of the Inventory Security Agreement and the terms and conditions described in the Wholesale Financing Plan for MCCORMICK INTERNATIONAL USA, published by Secured Party, dated 110602, as amended from time to time.

Debtor authorizes Secured Party to pay directly to the seller of the above described Collateral or other secured party all proceeds of this financing to the extent that such amount is owed by the Debtor.

DEBTOR : BEAR RIVER EQUIPMENT INC. **Approved : 03/31/2005**

By: AGRICREDIT ACCEPTANCE, LLC POA as attorney in fact

Secured Party: AGRICREDIT ACCEPTANCE, LLC

Location : Johnston, Iowa

By : Melody Webb

By : Fran Miller

Title : Wholesale Processor

Title : Wholesale Processing Supervisor

Dated : 03/30/2005

Witness : Samya Harlow

PENGAD 800-631-6989

DEPOSITION EXHIBIT 4 Briggs

PM : GREGORY BRIGGS
REGION : WEST REGION
MANUFACTURER REP : 045

Period End Statement

AGRICREDIT ACCEPTANCE, LLC
PERIOD END DATE : 10/31/2007
BEAR RIVER EQUIPMENT INC. / 0094196900

BEAR RIVER EQUIPMENT INC.
720 N STATE STREET
PRESTON ID 83263
UNITED STATES

Phone : 208 852 3434
Fax : 208 852 5791

Loan Number	Serial Number	Manufacturer Invoice	Make/Model Description	Invoice Date	Original Balance	Current Balance	Int Start Date	Final Due / Paid Date	Past Due Principal	Current Principal	Billing Days	Current Interest	Interest Rate	Contract Fees	Total Due
16103	7191485	26000440	MCCORMICK, L155	07/16/2006		7,185.42		01/20/2008		0.00		78.94		0.00	
01			LOADER		7,983.80		03/20/2007		798.38		31		12.75000		877.32
16104	JJE2056386	26000487	MCCORMICK, CX105	07/16/2006		33,487.06		01/20/2008		0.00		367.81		0.00	
01		100 HRS	TRACTOR		37,207.84		03/20/2007		3,720.78		31		12.75000		4,088.59
16105	7172073	26000870	MCCORMICK, L940	08/30/2006		6,468.91		02/20/2008		0.00		59.88		0.00	
01			LOADER		6,065.46		04/20/2007		606.55		31		12.75000		666.44
16106	JJE2056615	26000871	MCCORMICK, CX85	08/30/2006		28,757.02		02/20/2008		0.00		316.78		0.00	
01		32 HRS	TRACTOR		31,952.24		04/20/2007		3,195.22		31		12.75000		3,511.01
16107	7188924	26000872	MCCORMICK, L165	08/30/2006		0.00		10/03/2007		0.00		5.37		0.00	
Pd			LOADER		8,413.46		04/20/2007		0.00		2		12.75000		5.37
16108	JJE3336793	26000890	MCCORMICK, MTX150	08/31/2006		0.00		10/09/2007		0.00		39.88		0.00	
Pd			TRACTOR		62,551.29		04/20/2007		0.00		2		12.75000		39.88
16109	JJE2026767	26000891	MCCORMICK, MC115	08/31/2006		40,331.89		09/24/2007		0.00		444.94		0.00	
DO	NESLANTX		TRACTOR		48,148.54		04/20/2007		40,331.89		31		12.75000		40,776.83
16893	JJE3337195	0026001727	MCCORMICK, MTX120	12/19/2006		53,736.14		06/20/2008		0.00		589.98		0.00	
TO			MTX120		53,736.14		08/20/2007		5,373.61		31		12.75000		5,963.59
16894	JJE3337260	0026001728	MCCORMICK, MTX135	12/19/2006		57,188.46		09/24/2007		0.00		627.88		0.00	
DO	WESTFIELD		MTX135		57,188.46		08/20/2007		57,188.46		31		12.75000		57,816.[illegible]
16895	JJE3337242	0026001729	MCCORMICK, MTX135	12/19/2006		57,188.46		06/20/2008		0.00		627.74		0.00	
TO			MTX135		57,188.46		08/20/2007		5,718.85		31		12.75000		6,346.59
16897	JJE3337193	0026001754	MCCORMICK, MTX120	12/19/2006		53,736.14		09/24/2007		0.00		589.98		0.00	
DO	HIGLEY		MTX120		53,736.14		08/20/2007		53,736.14		31		12.75000		54,326.12
16898	7188906	0026001756	MCCORMICK, MCQL155	12/19/2006		7,983.79		06/20/2008		0.00		87.78		0.00	
01			LOADER		7,983.79		08/20/2007		798.38		31		12.75000		886.16

DLRPESTARB

JD 4430 # 0516LOR

DEPOSITION EXHIBIT
5
Briggs

PENGAD 800-631-6989

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PM : GREGORY BRIGGS
REGION : WEST REGION
MANUFACTURER REP : 046

Period End Statement

AGRICREDIT ACCEPTANCE, LLC
PERIOD END DATE : 10/31/2007
BEAR RIVER EQUIPMENT INC. / 0094196900

BEAR RIVER EQUIPMENT INC.
720 N STATE STREET
PRESTON ID 83263
UNITED STATES

Phone : 208 852 3434
Fax : 208 852 5791

Loan Number	Serial Number	Manufacturer Invoice	Make/Model Description	Invoice Date	Original Balance	Current Balance	Int Start Date	Final Due / Paid Date	Past Due Principal	Current Principal	Billing Days	Current Interest	Interest Rate	Contract Fees	Total Due
16899	7183971	0028001757	MCCORMICK, MCQL165	12/19/2006		7,983.79		06/20/2008		0.00		87.78		0.00	
01			LOADER		7,983.79		08/20/2007		798.38		31		12.75000		886.16
16901	7183970	0028001759	MCCORMICK, MCQL145	12/19/2006		6,926.12		09/24/2007		0.00		76.04		0.00	
DO MEYERS			LOADER		6,926.12		08/20/2007		6,926.12		31		12.75000		7,002.16
16904	7187745	0028001762	MCCORMICK, MCQL145	12/19/2006		6,586.64		06/20/2008		0.00		72.01		0.00	
01			LOADER		6,586.64		08/20/2007		658.66		31		12.75000		730.67
17027	JJE2069356	0028001828	MCCORMICK, CX105	12/27/2006		41,562.32		09/24/2007		0.00		456.32		0.00	
DO MEYERS			CX105 XTRASHIFT		41,562.32		08/20/2007		41,562.32		31		12.75000		42,018.64
17079	PE409845	T/JJE2056885	JCB, 214S	12/29/2006		0.00		06/20/2007		0.00		16.24		0.00	
Rd			BACKOE LOADER		28,865.00		03/20/2007		0.00		2		12.75000		16.24
17739	JJE2058843	26000693	MCCORMICK, CX85 ULTRASHIFT	08/31/2006		34,495.09		09/24/2007		0.00		378.73		0.00	
DO OxBorrow			TRACTOR		38,327.88		04/20/2007		34,495.09		31		12.75000		34,873.82
19165	JJE2052449	T/JJE20550801	MCCORMICK,	05/29/2007		21,842.00		02/20/2008		2,184.20		236.90		0.00	
01		1500 lbs	CX75		21,842.00		08/27/2007		2,184.20		31		12.75000		4,608.30
19202	7217799	0027001035	MCCORMICK, MCQL165	05/30/2007		8,363.72		09/24/2007		0.00		91.83		0.00	
DO Nelson			LOADER		8,363.72		09/24/2007		8,363.72		31		12.75000		8,455.55
19203	7217798	0027001036	MCCORMICK, MCQL165	06/30/2007		8,387.25		09/24/2007		0.00		92.09		0.00	
DO Wesmers			LOADER		8,387.25		08/24/2007		8,387.25		31		12.75000		8,479.34
19700	7227138	0027001179	MCCORMICK, MCQL145	08/19/2007		6,460.72		12/20/2008		0.00		0.00		0.00	
01			LOADER		6,460.72		12/18/2007		0.00		0		0.00000		0.00
19701	7227137	0027001180	MCCORMICK, MCQL145	08/19/2007		6,460.72		12/20/2008		0.00		0.00		0.00	
01			LOADER		6,460.72		12/18/2007		0.00		0		0.00000		0.00
21331	JJE2080365	0027001682	MCCORMICK, CX105	08/20/2007		41,709.34		09/19/2007		0.00		89.79		0.00	
SU Stevens			CX105 XTRASHIFT		41,709.34		02/18/2008		41,709.34		31		2.50000		41,799.13

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ZETOR 7340 W/CDR #2955 CX 85 22967 2680 4WD 25647 1620 hrs

PM : GREGORY BRIGGS
REGION : WEST REGION
MANUFACTURER REP : 045

Period End Statement

AGRICREDIT ACCEPTANCE, LLC
PERIOD END DATE : 10/31/2007
BEAR RIVER EQUIPMENT INC. / 0094196900

BEAR RIVER EQUIPMENT INC.
720 N STATE STREET
PRESTON ID 83263
UNITED STATES

Phone : 208 852 3434
Fax : 208 852 5791

Loan Number	Serial Number	Manufacturer Invoice	Make/Model Description	Invoice Date	Original Balance	Current Int Start Balance Date	Final Due / Paid Date	Past Due Principal	Current Principal	Billing Days	Current Interest	Interest Rate	Contract Fees	Total Due

The machinery listed above has been inspected and verified by the undersigned. The undersigned certify that the machinery is in new condition (except as noted) and all machinery is complete as set forth on the original invoice (except as noted). The dealer certifies that the machinery listed above represents all machinery as of the statement period and date, in which Agricredit Acceptance LLC has a first security interest. The dealer certifies that equipment has not been sold except as noted.

Signed _____ Audit Representative 11/6/07 Date Signed _____ Dealer – LIND HARDT INC PRESTON ID Date

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[redacted]

As of this date _____

Model CX 105 Serial No. 356205857 Hourmeter _____

Is not on the dealer's lot, but is located at:

Name Bill Phillips Phone No. 887-2556

Address Downey, CA

And will be returned by: Date _____

Sold & Unpaid Date Out _____ AAC Contract # _____

Other Lender's Name _____ Pay-off date _____

Rentals Copy of Contract? Y/N Rental Proceeds Collected? Y/N

Demo's Date out 5/13/07 Expected return date 5/14

_____ Dealer Signature _____ Dealer Code

I have this ____ day of _____, 20___ verified the location of the above unit by (phone or physical inventory).

[signature] Field Equipment Auditor 5/23/07 Date

[redacted]

As of this date _____

Model _____ Serial No. _____ Hourmeter _____

Is not on the dealer's lot, but is located at:

Name _____ Phone No. _____

Address _____

And will be returned by: Date _____

Sold & Unpaid Date Out _____ AAC Contract # _____

Other Lender's Name _____ Pay-off date _____

Rentals Copy of Contract? Y/N Rental Proceeds Collected? Y/N

Demo's Date out _____ Expected return date _____

_____ Dealer Signature _____ Dealer Code

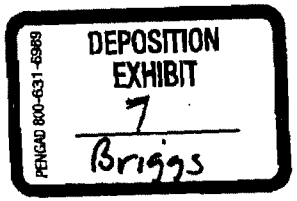
I have this ____ day of _____, 20___ verified the location of the above unit by (phone or physical inventory).

_____ Field Equipment Auditor _____ Date

PENGAD 800-631-6989

DEPOSITION EXHIBIT 6. Briggs

PM : GREGORY BRIGGS
REGION : WEST REGION
MANUFACTURER REP : 045



Period End Statement

AGRICREDIT ACCEPTANCE, LLC
PERIOD END DATE : 11/30/2007
BEAR RIVER EQUIPMENT INC. / 0094196900

BEAR RIVER EQUIPMENT INC.
720 N STATE STREET
PRESTON ID 83263
UNITED STATES

Phone : 208 852 3434
Fax : 208 852 5791

Loan Number	Serial Number	Manufacturer Invoice	Make/Model Description	Invoice Date	Original Balance	Current Balance	Int Start Date	Final Due / Paid Date	Past Due Principal	Current Principal	Billing Days	Current Interest	Interest Rate	Contract Fees	Total Due
16103	7191495	26000440	MCCORMICK, L155 LOADER	07/16/2006	7,983.80	7,185.42	03/20/2007	01/20/2008	798.38	0.00	30	74.72	12.50000	0.00	873.10
16104	JJE2056386	26000487	MCCORMICK, CX105 TRACTOR	07/16/2006	37,207.84	33,487.06	03/20/2007	01/20/2008	3,720.78	0.00	30	348.87	12.50000	0.00	[illegible]
16105	7172073	26000870	MCCORMICK, L940 LOADER	08/30/2006	6,065.46	5,458.91	04/20/2007	02/20/2008	606.55	0.00	30	56.93	12.50000	0.00	663.48
16106	JJE2056615	26000871	MCCORMICK, CX85 TRACTOR	08/30/2006	31,952.24	28,757.02	04/20/2007	02/20/2008	3,195.22	0.00	30	299.54	12.50000	0.00	3,494.76
16109	JJE2026767	26000891	MCCORMICK, MC115 TRACTOR	08/31/2006	48,146.54	40,331.89	04/20/2007	09/24/2007	40,331.89	0.00	30	420.12	12.50000	0.00	40,752.01
16893	JJE3337195	0026001727	MCCORMICK, MTX120 MTX120	12/19/2006	53,736.14	0.00	08/20/2007	11/08/2007	0.00	0.00	7	130.58	12.50000	0.00	130.58
16894	JJE3337250	0026001728	MCCORMICK, MTX135 MTX135	12/19/2006	57,188.46	57,188.46	08/20/2007	09/24/2007	57,188.46	0.00	30	595.71	12.50000	0.00	57,784.17
16895	JJE3337242	0026001729	MCCORMICK, MTX135 MTX135	12/19/2006	57,188.46	0.00	08/20/2007	11/08/2007	0.00	0.00	7	139.02	12.50000	0.00	139.02
16897	JJE3337193	0026001754	MCCORMICK, MTX120 MTX120	12/19/2006	53,736.14	53,736.14	08/20/2007	09/24/2007	53,736.14	0.00	30	559.75	12.50000	0.00	54,295.89
16898	7188905	0026001756	MCCORMICK, MCQL155 LOADER	12/19/2006	7,983.79	7,983.79	08/20/2007	06/20/2008	798.38	0.00	30	83.29	12.50000	0.00	881.67
16899	7183971	0026001757	MCCORMICK, MCQL155 LOADER	12/19/2006	7,983.79	7,983.79	08/20/2007	06/20/2008	798.38	0.00	30	83.29	12.50000	0.00	881.67
16901	7183970	0026001759	MCCORMICK, MCQL145 LOADER	12/19/2006	6,926.12	6,926.12	08/20/2007	09/24/2007	6,926.12	0.00	30	72.15	12.50000	0.00	6,998.27
16904	7187745	0026001762	MCCORMICK, MCQL145 LOADER	12/19/2006	6,566.64	6,566.64	08/20/2007	06/20/2008	656.66	0.00	30	68.35	12.50000	0.00	725.01
17027	JJE2059356	0026001829	MCCORMICK, CX105 CX105 XTRASHIFT	12/27/2006	41,562.32	41,562.32	09/20/2007	09/24/2007	41,562.32	0.00	30	432.94	12.50000	0.00	41,995.26
17738	JJE2058655	26000892	MCCORMICK, CX105 XTRASHIFT TRACTOR	08/31/2006	41,372.63	0.00	04/20/2007	11/20/2007	0.00	0.00	19	2,333.85	12.50000	0.00	2,333.85
17739	JJE2058843	26000893	MCCORMICK, CX85 ULTRASHIFT TRACTOR	08/31/2006	38,327.88	34,495.09	04/20/2007	09/24/2007	34,495.09	0.00	30	359.32	12.50000	0.00	34,854.41

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PM : GREGORY BRIGGS
REGION : WEST REGION
MANUFACTURER REP : 045

Period End Statement

AGRICREDIT ACCEPTANCE, LLC
PERIOD END DATE : 11/30/2007
BEAR RIVER EQUIPMENT INC. / 0094196900

BEAR RIVER EQUIPMENT INC.
720 N STATE STREET
PRESTON ID 83263
UNITED STATES

Phone : 208 852 3434
Fax : 208 852 5791

Loan Number	Serial Number	Manufacturer Invoice	Make/Model Description	Invoice Date	Original Balance	Current Balance	Int Start Date	Final Due / Paid Date	Past Due Principal	Current Principal	Billing Days	Current Interest	Interest Rate	Contract Fees	Total Due
19165	JJE2052449	T/JJE20550801	MCCORMICK, CX75	05/29/2007	21,842.00	21,842.00	08/27/2007	02/20/2008	4,368.40	0.00	30	227.47	12.50000	0.00	4,595.87
19202	7217799	0027001035	MCCORMICK, MCQL165 LOADER	05/30/2007	8,363.72	8,363.72	09/24/2007	09/24/2007	8,363.72	0.00	30	87.12	12.50000	0.00	8,450.84
19203	7217796	0027001036	MCCORMICK, MCQL165 LOADER	05/30/2007	8,387.25	8,387.25	09/24/2007	09/24/2007	8,387.25	0.00	30	87.37	12.50000	0.00	8,474.62
19700	7227138	0027001179	MCCORMICK, MCQL145 LOADER	06/19/2007	6,460.72	6,460.72	12/16/2007	12/20/2008	0.00	0.00	0	0.00	0.00000	0.00	0.00
19701	7227137	0027001180	MCCORMICK, MCQL145 LOADER	06/19/2007	6,460.72	6,460.72	12/16/2007	12/20/2008	0.00	0.00	0	0.00	0.00000	0.00	0.00
21331	JJE2060365	0027001682	MCCORMICK, CX105 CX105 XTRASHIFT	08/20/2007	41,709.34	336.71	02/16/2008	09/19/2007	336.71	0.00	30	-122.85	2.50000	0.00	213.86

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CUSTODY RECEIPT

I/we, the undersigned, hereby acknowledge receipt from Agricredit Acceptance LLC (hereafter referred to as AAC) of the goods listed below, and undertake and agree to hold and store safely said goods subject to the order of AAC. Said goods are hereby acknowledged to be the property of AAC and I/we undertake and agree to deliver same to third parties only at the express written direction of AAC.

It is further understood that no fee will be assessed by the receiver for such storage unless mutually agreed upon in writing by the parties herein named.

QUANTITY	DESCRIPTION OF GOODS (INCLUDE MAKE, MODEL, AND MAJOR ATTACHMENTS. NOTE CONDITION, I.E., DAMAGE, MISSING PARTS, ETC.)	SERIAL NUMBER
1	McCormick L155 loader	7191495
1	MCormick CX 85 tractor 332Hours	JJE2056615
1	MCormick L940 loader -	7172073
1	McCormick MTX 150 Tractor	JJE3336793
1	McCormick L 165 loader w/ bucket # 7188924	
1	McCormick MTX 120 Tractor 69 hrs	JJE3337195
1	McCormick MTX 135 Tractor 40 hrs	JJE3337242
1	McCormick L 155 loader	7188905
1	mcCormicl L 155 loader	7183971
1	McCormick L 145 loader	7187745
~~1~~	~~JOB Bucket~~	~~PE409845~~
1	McCormick CX 85 1500 hrs	JJE2052449
1	McCormick L 145 loader	7227138
1	McCormick L 145 loader	7227137
3	buckets for loaders	
5	Mounting brackets for loaders	
1	JD 4430 -- trade on JJE3337193 MTX 120	051620R
1	Zetor 7340 tractor w/ Eezon 2070 loader - trade on JJE2059356	2955
1	McCormick CX105 100.4 HRS	JJE2056386
1	McCormick L 145 loader w/ bucket	7187744
1	Hesston 565A Round Baler (Krone# T711742)	00648
1	McCormick XTX 200 tractor	JJE3500133
1	Sitrex wheel rake (Krone - # 716019SW900)	RP 5 40187

DEPOSITION EXHIBIT 8 Briggs

PENGAD 800-631-6989

CUSTOMER'S NAME Bear River Equipment ACCOUNT NO.

NAME OF RECEIVER Lindhardt International TELEPHONE NO. 208-852-0313

ADDRESS 60 North State, Preston, ID

AUTHORIZED SIGNATURE Robert Lindhardt DATE 10-1-07

AAC 738 (4/02)

DLR. # 100105001 BEAR RIVER EQ. PRESTON, ID

MODEL	INV #	S/N	OPTIONS	DT. SHIP	DT. SOLD	CUSTOMER
MC 115		JJE2026767		SOT		NESLANIK
MTX 135		JJE3337250		SOT		WESTATES
MTX 120		JJE333493		SOT		HIGLEY
CX 105		JJE2059356	ULTRA SHIFT	SOT		MEYERS
CX 85		JJE2058843	ULTRA SHIFT	SOT		OXBORROW
MCQL 145		7183970		SOT		MEYERS
MCQL 165		7217799		SOT		NESLANIK
MCQL 165		7217796		SOT		WESTATES
MCQL 145	26000960	7184915		SOT		PHILLIPS
MCQL 165	26000957	7184657		SOT		HIGLEY
		ON	HAND STOCK			
CX 105	26000487	JJE2056386	100 HRS 2/27/08 NOT W. REG X-TRA SHIFT	7/16/06		
CX 85	26000871	JJE2056615	W. GOOD TO 10/31/08 W/LOR S/N 7172073 337 HRS 2/27/08	8/30/06		
CX 105	26000892	JJE2058655	CAB/AIR 4WD NOT W REG X-TRA SHIFT	8/31/06		ENGINE REPLACEMENT TM ACCOUNT
CX 85	26000893	JJE2058843	X-TRA SHIFT	8/31/06		
L155	26000440	7191495	MC/MTX BOSCH MTG	7/16/06		
L940	26006870	7172073	ON CX85 S/N 6615	8/30/06		
MCQL 155	26001756	7188905	MC-PC MTG	12/19/06		

DEPOSITION EXHIBIT 9 Briggs

PENGAD 800-631-6989

400

Remittance Form

McCORMICK

Dealer Name: Bear River Equip

Address 720 N. State Street

City, State Preston ID

Account # ED0105

DEPOSITION EXHIBIT 10 Briggs

McCormick International U.S.A., Inc.
P.O. Box 81 Tel: 866-327-6733
Pella, IA 50219 Fax: 641-621-7932

Detail for Payment enclosed: Check #: _____ Amount: $ _____

Invoice or Credit #	Model	Serial Number (Chassis #)	Invoice Amount (including trade & cash discounts) i.e. Balance Due Amt	30-day Cash Discount	Instant Volume Discount CZL	%	Program Discount	Program ID: Name, #, or Month TRADE 74	Net Amount Paid
26001829	CX105	JJE 2059356	41,562.32		2100		1500	2000 14500.	37,962.32
26001759	L145	7183970	6926.12						6926.12
26000893	CX85	JJE 2058843	38,327.88		2100		1500		34,727.88
27001036	L165	7217796	8387.25						8387.25
26001728	MX135	JJE 3337250	57,888.46		3300		2000		51,588.46
1754	MX120	JJE 3337193	53,736.14		3300		2000	4430	48,436.14
26000891	MC115	JJE 2086767	43,331.89		2100.00		1500	4030	39,731.89
27001035	L165	7217799	8363.72						
Totals:			257,823.79		(12,900)		(8500)		236,060.06

236,423.78

4588.00

10

BEAR RIVER EQUIPMENT INC. 0094196900
11/09/2007

(1) OPEN

	LOAN #	Serial Number	Make	Model	Description	Original Balance	Current Balance	STATUS	11/06/2007 PM audit
N	16103	7191495	MCC	L155	LOADER	7,983.80	7,185.42	Lindhart	
N	16104	JJE2056386	MCC	CX105	TRACTOR	37,207.84	33,487.06	Lindhart	
N	16105	7172073	MCC	L940	LOADER	6,065.46	5,458.91	Lindhart	
N	16106	JJE2056615	MCC	CX85	TRACTOR	31,952.24	28,757.02	Lindhart	
N	16107	7188924	MCC	L165	LOADER	8,413.46	0.00	to Tom Lewis	
N	16108	JJE3336793	MCC	MTX150	TRACTOR	62,551.29	0.00	to Tom Lewis	
N	16893	JJE3337195	MCC	MTX120	MTX120	53,736.14	0.00	Lindhart	Transfered 10/24
N	16895	JJE3337242	MCC	MTX135	MTX135	57,188.46	0.00	Lindhart	Transfered 10/24
N	16898	7188905	MCC	MCQL155	LOADER	7,983.79	7,983.79	Lindhart	
N	16899	7183971	MCC	MCQL155	LOADER	7,983.79	7,983.79	Lindhart	
N	16904	7187745	MCC	MCQL145	LOADER	6,566.64	6,566.64	Lindhart	
U	17079	PE409845	JCB	214S	BACKOE LOADER	28,665.00	0.00		
U	19165	JJE2052449	MCC	null	CX75	21,842.00	21,842.00	Lindhart	
N	19700	7227138	MCC	MCQL145	LOADER	6,460.72	6,460.72	Lindhart	
N	19701	7227137	MCC	MCQL145	LOADER	6,460.72	6,460.72	Lindhart	
N	21331	JJE2060365	MCC	CX105	CX105 XTRASHIFT	41,709.34	41,709.34	swapped	
N	21334	JJE2060499	MCC	CX105	CX105 XTRASHIFT	41,709.34	0.00		
							173,895.41		

(2) SOT

	LOAN #	Serial Number	Make	Model	Description	Original Balance	Current Balance
N	17739	JJE2058843	MCC	CX85 ULTRASHIFT	TRACTOR	38,327.88	34,495.09
N	16109	JJE2026767	MCC	MC115	TRACTOR	48,146.54	40,331.89
N	16894	JJE3337250	MCC	MTX135	MTX135	57,188.46	57,188.46
N	16897	JJE3337193	MCC	MTX120	MTX120	53,736.14	53,736.14
N	16901	7183970	MCC	MCQL145	LOADER	6,926.12	6,926.12
N	17027	JJE2059356	MCC	CX105	CX105 XTRASHIFT	41,562.32	41,562.32
N	19202	7217799	MCC	MCQL165	LOADER	8,363.72	8,363.72
N	19203	7217796	MCC	MCQL165	LOADER	8,387.25	8,387.25
							250,990.99
						TOTAL	424,886.40
					thru 10/31/07	INTEREST	16,015.35
						SUSPENSE	-14,169.00
							-1,846.35
						NET TOTAL	424,886.40

13.25 PAST DUE %

From Boehme contract

Excess from JCB sale

(19,000) 11/9 cashiers

DEPOSITION EXHIBIT
11
Briggs
PENGAD 800-631-6989

403

CHECK APPLICATION ADVICE

DEALER: BEAR RIVER EQUIPMENT, INC.
DEALER CODE: 009419.6900
CHECK NUMBER: 3824
TODAY'S DATE: 05/29/07
PRINCIPAL AMOUNT: $22,675.14
INTEREST: $

APPLY PRINCIPAL AMOUNT AS FOLLOWS:

SERIAL NUMBER	AMOUNT
925476	$16,000.00 (12711)
JJE2055080	$6,675.14 (12100)

3824

BEAR RIVER EQUIPMENT, INC.
720 NORTH STATE STREET
PRESTON, ID 83263
PH. (208) 852-3434 FAX (208) 852-5959

IRELAND BANK
PRESTON, IDAHO 83263
92-85-1241

5-22-07

PAY TO THE ORDER OF Agri-Credit $22,675.14

Twenty-Two Thousand Six Hundred Seventy-Five & 14 DOLLARS

Security Features Included. Details on back.

MEMO Suite 8830 CX 95

Thomas M

⑈003824⑈ ⑆124100857⑆ 80 10205 4⑈

DEPOSITION EXHIBIT
12
Briggs

PENGAD 800-631-6989

DEALER SETTLEMENT WORKSHEET

Agricredit
de lage landen

Date:	5/23/07
Dealer:	Bear River Equip.
Dlr #	ED0105
City/St	Preston ID

Item	Invoice Number	Description/Model	Serial	Floor Plan Amount	Deductions Cash Discount	Deductions Other	Describe Discount Other	Net Amount Paid
	T/JJE3334704	8830 ford	925476	16,000.00				16,000
							INT	[redacted]
							Sub Total	16, [redacted]

Trade-Ins

Item	Manufacturer	Description/Model	Serial	Year	Hours	Options	Average Wholesale	Net Trade-In Allowance
							Less Trade Sub Total	

Item	Options	Condition	Value

AAC Retail Contract	Amount Financed	
	Filling Fee	
	Admin	
	Total Deductions	
	Less Net Proceeds	

To ensure timely and accurate application of funds and trade-in Please Check Boxes

Check and Net $ Same ☐	If trade taken attach copy of your Dealer Retail Sales Agreement (Purchase Order/Invoice) with Buyer's Signature ☐	Net Amount Paid	$ 16,000.00
Dealer Name Inserted ☐		Check Number	
		Check Amount	

Authorized Dealer Signature and Title: Thomas M [signature]

Approval

Send Remittance Via Regular Mail to: Agricredit Acceptance LLC, PO Box 8362, Des Moines, IA 50301-8362
Send Remittance Via Overnight Mail to: Agricredit Acceptance LLC, 8001 Birchwood Court, Johnston IA 50131-2930

AAC 4672 (10/04)

RETURN WITH RETAIL CONTRACT / PAYMENT

104

DEALER SETTLEMENT WORKSHEET

Agricredit
de Lage Landen

Date:	5-23-07
Dealer:	Bear River Eq.
Dlr #	ID 0105
City/St	Preston ID. 83263

Item	Invoice Number	Description/Model	Serial	Floor Plan Amount	Deductions: Cash Discount	Deductions: Other	Describe Discount: Other	Net Amount Paid
1	26000044	CX 25 Trac.	JJE 2055080	32,117.14	$2100.00 CRD	Lien -	1500.00 Retail	
					Cash Rebate		Retail Sales	
							Sub Total	28,517.14

Trade-Ins

Item	Manufacturer	Description/Model	Serial	Year	Hours	Options	Average Wholesale	Net Trade-In Allowance
1	McCormick	CX25	JJE 205449	2004	750		24,622.	
		Book 24,622				444 -	2680	
		444 2680					27,302	
		$27,302.00					80%	
						Less Trade Sub Total →		21,842.00

Item	Options	Condition	Value

Please Floor Trade

AAC Retail Contract		
	Amount Financed	
	Filling Fee	
	Admin	
	Total Deductions	
	Less Net Proceeds	

To ensure timely and accurate application of funds and trade-in Please Check Boxes

Check and Net $ Same	☐	If trade taken attach copy of your Dealer Retail Sales Agreement (Purchase Order/Invoice) with Buyer's Signature	☐	Net Amount Paid $6675.14
Dealer Name Inserted	☐			Check Number
				Check Amount

Authorized Dealer Signature and Title: Thomas M

Approval

Send Remittance Via Regular Mail to: Agricredit Acceptance LLC, PO Box 8362, Des Moines, IA 50301-8362
Send Remittance Via Overnight Mail to: Agricredit Acceptance LLC, 8001 Birchwood Court, Johnston IA 50131-2930

AAC 4672 (10/04)

RETURN WITH RETAIL CONTRACT / PAYMENT

405

001/001

CHECK APPLICATION ADVICE

DEALER: BEAR RIVER
DEALER CODE: 009419.6900
CHECK NUMBER: 3472
TODAY'S DATE: 02/28/07
PRINCIPAL AMOUNT: $76,050.10
INTEREST: $1,663.58

APPLY PRINCIPAL AMOUNT AS FOLLOWS:

SERIAL NUMBER	AMOUNT	
JJE2023693	$44,514.10	16045 > 40,062.69
JJE2055985	$8,500.00	16099
M34102	$23,036.00	16445 > 20,732.40

3472

BEAR RIVER EQUIPMENT, INC.
720 NORTH STATE STREET
PRESTON, ID 83263
PH. (208) 852-3434 FAX (208) 852-5959

IRELAND BANK
PRESTON, IDAHO 83263
92-85-1241

2-26-07

PAY TO THE ORDER OF Agri-Credit $ 77,713.68

Seventy-Seven Thousand Seven hundred thirteen & 68/ DOLLARS

MEMO MC120 - 2023693, VAHRA - M34102
CX85 - 2055985
Date Paid Dec 2nd

Thomas M

⑈003472⑈ ⑆124000857⑆ 80 10205 4⑈

DEPOSITION EXHIBIT
13
Briggs

PENGAD 800-631-6989

406

will pay [illegible] upon [illegible] Cooper

DEALER SETTLEMENT WORKSHEET

McCORMICK CREDIT

Date:	2-26-07
Dealer:	Bear River Eq
Dir #	ID0105
City/St	Preston ID 83263

Item	Invoice Number	Description/Model	Serial	Floor Plan Amount	Deductions: Cash Discount	Deductions: Other	Describe Discount: Other	Net Amount Paid
	T/P JJE 3336598	MC120	JJE2023693					44,514.10
	T/P JJE 202 5397	Vulcan 2004	M34102					23,036.00
	26000042	CX-85	JJE2055985					8500.00
			Interest	Presently Past Due				1663.55
							Sub Total	~~76,713.65~~
								$77,713.65

Trade-Ins

Item	Manufacturer	Description/Model	Serial	Year	Hours	Options	Average Wholesale	Net Trade-In Allowance
							Less Trade Sub Total	

Item	Options	Condition	Value

AAC Retail Contract	Amount Financed	
	Filling Fee	
	Admin	
	Total Deductions	
	Less Net Proceeds	

To ensure timely and accurate application of funds and trade-in Please Check Boxes

Check and Net $ Same ☐	If trade taken attach copy of your Dealer Retail Sales Agreement (Purchase Order/Invoice) with Buyer's Signature ☐	Net Amount Paid	77713.65
Dealer Name Inserted ☐		Check Number	3472
		Check Amount	77,713.65

uthorized Dealer Signature and Title: [signature]

Approval

ng Remittance Via Regular Mail to: Agricredit Acceptance LLC, PO Box 8362 Des Moines, IA 50301-8362

d Remittance Via Overnight Mail to: Agricredit Acceptance LLC, 8001 Birchwood Court, Suite C, Johnston IA 50131-0200

407

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF FRANKLIN

* * * * * *

McCORMICK INTERNATIONAL USA, INC.., a corporation Plaintiff, vs. BEAR RIVER EQUIPMENT, INC., a Corporation; WILLIAM R. SHORE, an individual; and ROBERTA SHORE, an individual, Defendants.	Case No. CV-2008-327 MINUTE ENTRY AND ORDER
ROBERTA SHORE, an individual, Third-Party Plaintiff, vs. NICHOLAS BOKIDES, an individual Third-Party Defendant.	

This matter came before the Court on the Court's own motion for status hearing. Steven R. Fuller appeared for and on behalf of the Plaintiff, McCormick International USA, Inc. James G. Reid appeared telephonically for and on behalf of the Defendants and the Third-Party Plaintiff, Roberta Shore and Charles Edward Cather II appeared telephonically for Third-Party Defendant, Nicholas Bokides.

There are presently pending before the Court three (3) separate motions for summary judgment in this proceeding, Third Party Defendant's Motion for Summary Judgment, Plaintiff's Motion for Summary Judgment and Third-Party Plaintiff's Motion for Summary Judgment.

On June 7, 2010, Defendant's filed their Notice of Non-Opposition to Plaintiff's Motion for Summary Judgment. The Court inquired concerning the status of this matter and the parties acknowledged that there would be no opposition from the Defendant's or the Third Party Defendant's to Plaintiff's Motion for Summary Judgment. As such, the Court **GRANTED** Plaintiff's Motion for Summary Judgment and requested that Plaintiff's counsel submit an Order for Summary Judgment to the Court. Upon receipt of an appropriate Order for Summary Judgment the Court will sign the same.

The Court had previously heard argument on Third Party Defendant's Motion for Summary Judgment. This matter was under advisement by the Court. However, the Court advised that in light of the Plaintiff's now having summary judgment against the Defendants and Third Party Plaintiff's pending Motion for Summary Judgment, the Court would wait to issue its decision on Third Party Defendant's Motion for Summary Judgment at the same time it issues its decision on Third Party Plaintiff's Motion for Summary Judgment. Third Party Plaintiff's Motion for Summary Judgment is presently set for hearing on June 21, 2010. As such, the Court will take both Third Party Plaintiff's and Third Party Defendant's Motions for Summary Judgment under advisement at the conclusion of the hearing on Third Party Plaintiff's Motion for Summary Judgment on June 21, 2010.

IT IS SO ORDERED.

DATED: June 10, 2010

Mitchell W. Brown

MITCHELL W. BROWN
District Judge

CERTIFICATE OF MAILING/SERVICE

I hereby certify that on June 15, 2010, I mailed/served/faxed a true copy of the foregoing document on the attorney(s)/person(s) listed below by mail with correct postage thereon or causing the same to be hand delivered.

Attorney(s)/Person(s):	Method of Service:
Steven R. Fuller Attorney for Plaintiff	Faxed: 852-2683
James G. Reid Attorney for Roberta Shore	Faxed: (208) 342-4657
Charles Edward Cather III Attorney for Nicholas Bokides	Faxed: 522-5111

V. ELLIOTT LARSEN, Clerk

BY: Linda Hampton
Linda Hampton, Deputy

JAMES G. REID, ISB #1372
LAURA E. BURRI, ISB #3573
S. BRYCE FARRIS, ISB #5636
RINGERT LAW CHARTERED
455 S. Third, P. O. Box 2773
Boise, Idaho 83701-2773
Telephone: (208) 342-4591
Facsimile: (208) 342-4657
Attorneys for Defendants/Third Party Plaintiff

FILED
10 JUN 14 PM 2:41
FRANKLIN COUNTY CLERK
Kjones
DEPUTY

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF FRANKLIN

*
*
*

MCCORMICK INTERNATIONAL USA, INC., a corporation Plaintiff, vs. BEAR RIVER EQUIPMENT, INC., a corporation, WILLIAM R. SHORE an individual; and ROBERTA SHORE, an individual, Defendants.	)	Case No. CV 08-327 **THIRD PARTY PLAINTIFF'S MOTION TO STRIKE**
ROBERTA SHORE, an individual, Third-Party Plaintiff, vs.	)	

NICHOLAS BOKIDES, an individual,)
)
Third-Party Defendant.)
*
*
*

COMES NOW Third Party Plaintiff, Roberta Shore (hereinafter "Roberta Shore"), by and through their attorneys of record, Ringert Law Chartered, and hereby submits this Motion to Strike selected portions of the Affidavit of C. Edward Cather in Opposition to Third-Party Plaintiff's Motion for Summary Judgment. More specifically, Roberta Shore moves to strike the references to Exhibits 5 and 7 to the deposition of Greg Briggs as inadmissible hearsay.

The grounds for this *Motion* are that Third-Party Defendant, Nicholas Bokides, has submitted the Affidavit of C. Edward Cather in Opposition to Third Party Plaintiff's Motion for Summary Judgment and said affidavit contains inadmissible hearsay. Rule 56(e) of the Idaho Rules of Civil Procedure provides that "opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, . . ." The Affidavit of C. Edward Cather simply attaches the deposition of Greg Briggs, including Exhibits 5 and 7. However, it is well established that the evidence still must be admissible in order for this Court to consider it in summary judgment deliberations. Third-Party Defendant has not laid proper foundation that Exhibits 5 and 7, which are clearly inadmissible hearsay, meet any of the hearsay exceptions. Therefore, Exhibits 5 and 7 should be stricken and any facts or inferences contained in Exhibits 5 and 7 should not be considered by this Court in deciding Third Party Plaintiff's Motion for Summary Judgment.

Roberta Shore requests oral argument on its *Motion*.

DATED this __ day of June, 2010.

RINGERT LAW CHARTERED

By _____
James G. Reid

CERTIFICATE OF SERVICE

I hereby certify that on the 14 day of June, 2010, a true and correct copy of the foregoing was served upon all parties listed below by:

( ) U. S. mail, postage prepaid
( ) hand delivery
( ) express mail
(X) facsimile

Steven R. Fuller
Steven R. Fuller Law Office
24 North State
P.O. Box 191
Preston, ID 83262

Ed Cather
Moffatt, Thomas
P.O. Box 51505
Idaho Falls, ID 83405-1505

_____
James G. Reid

JAMES G. REID, ISB #1372
LAURA E. BURRI, ISB #3573
S. BRYCE FARRIS, ISB #5636
RINGERT LAW CHARTERED
455 S. Third, P. O. Box 2773
Boise, Idaho 83701-2773
Telephone: (208) 342-4591
Facsimile: (208) 342-4657
Attorneys for Defendants/Third Party Plaintiff

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF FRANKLIN

*
*
*

MCCORMICK INTERNATIONAL USA, INC., a corporation Plaintiff, vs. BEAR RIVER EQUIPMENT, INC., a corporation, WILLIAM R. SHORE an individual; and ROBERTA SHORE, an individual, Defendants.	)	Case No. CV 08-327 **THIRD PARTY PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION TO STRIKE**
ROBERTA SHORE, an individual, Third-Party Plaintiff, vs.	)	

NICHOLAS BOKIDES, an individual,)
)
Third-Party Defendant.)
*
*
*

COMES NOW Third Party Plaintiff, Roberta Shore (hereinafter "Roberta Shore"), by and through her attorneys of record, Ringert Law Chartered, and hereby submits this Memorandum in Support of her Motion to Strike selected portions of the Affidavit of C. Edward Cather in Opposition to Third-Party Plaintiff's Motion for Summary Judgment.

On or about June 10, 2010, Third Party Defendant ("Bokides") submitted a Memorandum in Opposition to Third Party Plaintiff's Motion for Summary Judgment along with the supporting affidavit of C. Edward Cather. However, said affidavit includes attachments which are inadmissible hearsay, do not meet the requirements of Rule 56(e) of the Idaho Rules of Civil Procedure and should be stricken for purposes of Third Party Plaintiff's Motion for Summary Judgment.

1. **Exhibits 5 and 7 Referenced in Bokides' Memorandum and Affidavit should be Stricken.**

Rule 56(e) of the Idaho Rules of Civil Procedure provides:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be **admissible in evidence**, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of that party's pleadings, but the party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party.

In State v. Shama Resources Ltd. Partnership, 127 Idaho 267, 899 P.2d 977 (1995), the court stated that "[t]he requirements of Rule 56(e) are not satisfied by an affidavit that is conclusory, based on hearsay, and not supported by personal knowledge. Only material contained in affidavits **or depositions** that is based upon personal knowledge or that is admissible at trial will be considered by this court." Id. at 271, 899 P.2d at 981 (citations omitted). In State v. Shama Resources Ltd. Partnership the defendant's affidavit made generalizations and declarations about information supposedly known by other individuals, made statements that were conclusory and unsupported, made suppositions about the beliefs and expectations of other individuals and contained statements of hearsay that would not be admissible in evidence. Id. Accordingly, the court held that because the affidavits of the defendant were not based upon personal knowledge, were insufficient and conclusory in nature, and contained statements of hearsay that would not be admissible into evidence, the trial court properly rejected the affidavits when ruling on the plaintiff's motion for summary judgment. Id. More specific to this case, "it is well established that hearsay evidence in depositions is not admissible in summary judgment deliberations." Nelson v. Steer, 118 Idaho 409, 797 P.2d 117 (1990). Thus, even though the deposition itself may be admissible or meet one of the hearsay exceptions, hearsay evidence in the deposition, or hearsay evidence in the exhibits to the deposition are inadmissible for purpose of a summary judgment motion.

In this case, the Affidavit of C. Edward Cather simply attaches the deposition of Greg Briggs, including Exhibits 5 and 7. However, simply because the exhibits were attached to the deposition of Mr. Griggs does not eliminate the requirement that the exhibits must be admissible evidence. As discussed, supra, hearsay evidence in depositions is not admissible. In order for Exhibits 5 and 7 to be admissible for purposes of Roberta Shore's Motion for Summary Judgment,

Bokides must establish that the exhibits meet one of the hearsay exceptions.

Exhibits 5 and 7 are not documents prepared by Mr. Briggs, and simply because he reviewed or received the documents does not meet any of the hearsay exceptions. Bokides may suggest that the documents meet the business records exception under Rule 803(6) of the I.R.E., but the mere receipt and retention by a business entity of a document that was created elsewhere does not transform the document into a business record under Rule 803(6). Posey v. Ford Motor Credit Co., 141 Idaho 477, 111 P.3d 162 (Ct.App. 2005).

The bottom line is that Bokides has not laid any foundation that the exhibits meet any of the hearsay exceptions and it is simply too late to do so for purposes of Roberta Shore's motion for summary judgment. Accordingly, Exhibits 5 and 7 should be stricken and any facts or inferences contained in Exhibits 5 and 7 should not be considered by this Court in deciding Third Party Plaintiff's Motion for Summary Judgment.

DATED this 14 day of June, 2010.

RINGERT LAW CHARTERED

By _____
James G. Reid

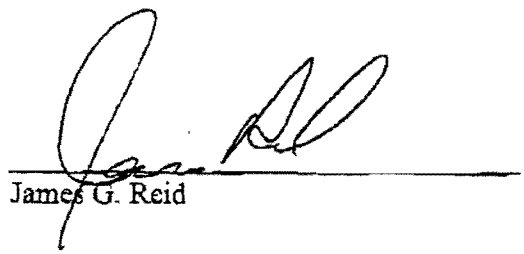
CERTIFICATE OF SERVICE

I hereby certify that on the 4 day of June, 2010, a true and correct copy of the foregoing was served upon all parties listed below by:

( ) U. S. mail, postage prepaid
( ) hand delivery
( ) express mail
(✓) facsimile

Steven R. Fuller
Steven R. Fuller Law Office
24 North State
P.O. Box 191
Preston, ID 83262

Ed Cather
Moffatt, Thomas
P.O. Box 51505
Idaho Falls, ID 83405-1505



James G. Reid

JAMES G. REID, ISB #1372
LAURA E. BURRI, ISB #3573
S. BRYCE FARRIS, ISB #5636
RINGERT LAW CHARTERED
455 S. Third, P. O. Box 2773
Boise, Idaho 83701-2773
Telephone: (208) 342-4591
Facsimile: (208) 342-4657
Attorneys for Defendants/Third Party Plaintiff

FILED
10 JUN 15 AM 9:05
FRANKLIN COUNTY CLERK
K Jones
DEPUTY

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF FRANKLIN

MCCORMICK INTERNATIONAL USA, INC., a corporation Plaintiff, vs. BEAR RIVER EQUIPMENT, INC., a corporation, WILLIAM R. SHORE an individual; and ROBERTA SHORE, an individual, Defendants.	Case No. CV 08-327 **ORDER GRANTING MOTION TO SHORTEN TIME**
ROBERTA SHORE, an individual, Third-Party Plaintiff, vs.	

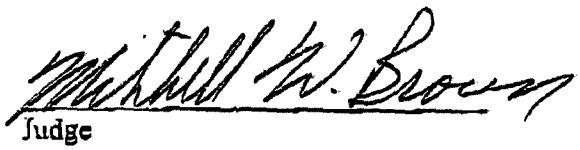
419

NICHOLAS BOKIDES, an individual,)
)
Third-Party Defendant.)
*
*
*

The Motion to Shorten Time filed by Third Party Plaintiff in the above matter having come before the Court, and good cause appearing therefore,

IT IS HEREBY ORDERED AND THIS DOES ORDER that the Third Party Plaintiff is allowed to shorten the time for notice of hearing on Third Party Plaintiff's Motion to Strike. The hearing on said motion shall be heard on the 21st day of June, 2010, at 1:30 p.m.

DATED this 15th day of June, 2010.



Judge

CERTIFICATE OF SERVICE

I hereby certify that on the __ day of June, 2010, a true and correct copy of the foregoing was served upon all parties listed below by:

( ) U. S. mail, postage prepaid
( ) hand delivery
( ) express mail
(X) facsimile

Steven R. Fuller - 852-2683
Steven R. Fuller Law Office
24 North State
P.O. Box 191
Preston, ID 83262

Ed Cather - 522-5111
Moffatt, Thomas
P.O. Box 51505
Idaho Falls, ID 83405-1505

James G. Reid - 208-342-4657
P.O. Box 2773
Boise, ID 83701

Linda Hampton
Person serving documents

FILED

10 JUN 16 PM 4:41

FRANKLIN COUNTY CLERK

LHampton

DEPUTY

Bradley J Williams, ISB No. 4019
Charles Edward Cather III, ISB No. 6297
MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED
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Post Office Box 51505
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Attorneys for Nicholas Bokides, Third-Party Defendant

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF FRANKLIN

McCORMICK INTERNATIONAL USA, INC., a corporation, Plaintiff, vs. BEAR RIVER EQUIPMENT, INC., a corporation; WILLIAM R. SHORE, an individual; and ROBERTA SHORE, an individual, Defendants. ROBERTA SHORE, an individual, Third-Party Plaintiff, vs. NICHOLAS BOKIDES, an individual, Third-Party Defendant.	Case No. CV 08-327 **NICHOLAS BOKIDES' MEMORANDUM IN OPPOSITION TO THIRD-PARTY PLAINTIFF'S MOTION TO STRIKE**

COMES NOW the Third-Party Defendant, Nicholas Bokides, by and through undersigned counsel, and hereby submits this *Memorandum in Opposition to Third-Party Plaintiff's Motion to Strike*. Third-Party Plaintiff argues that Exhibit 5 and 7 to the Deposition of Greg Briggs taken in this action on February 23, 2009 are inadmissible for summary judgment motion. This motion is without merit.

I. ARGUMENT

Rule 803 of the Idaho Rules of Evidence provides that

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness.
>
> ...
>
> (6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.
>
> ...

Exhibit 5 to the Briggs deposition is identified on its face as an Agricredit Acceptance, LLC Period End Statement for the period ending October 31, 2007. Exhibit 5 was authenticated and described by Mr. Briggs, during his deposition, as an audit form and period end statement of Agri-Credit which is "used to follow the flow of the equipment." Deposition of Greg Briggs taken February 23, 2009 ("Briggs Depo."), p. 36, L. 16 – P. 37, L. 23. Attached to the Affidavit of C. Edward Cather. Mr. Briggs indicated that he regularly performed audits as

an agent of Agri-Credit and that Agri-Credit would provide an audit form similar to what was marked as Exhibit 5 to his deposition. Briggs Depo., p. 15, L. 8-13; p. 18, L. 24 – p. 19, L. 19; p. 36, L. 11- P. 37, L. 3. Mr. Briggs also indicated that Exhibit 5 was the audit form he used and marked in his audit of Bear River Equipment. *See* Briggs Depo., P. 36, L. 16 – P. 51, L. 15. During the deposition, Mr. Reid questioned Mr. Briggs repeatedly about the use and significance of the audit form/period end statement marked as Exhibit 5. *See* Briggs Depo., P. 36, L. 16 – P. 51, L. 15.

Exhibit 7 is identified on its face as an Agricredit Acceptance, LLC Period End Statement for the period ending November 30, 2007. Exhibit 7 was authenticated and described by Mr. Briggs, during his deposition, as an Agri-Credit period end statement provided to the dealers. Briggs Depo., p. 59, L. 8-17. During the deposition, Mr. Reid questioned Mr. Briggs regarding the differences between the period end statement used in the audit of Bear River (Exhibit 5) and period end statement provided to Bear River (Exhibit 7). *See* Briggs Depo., p. 59, L. 8 – p. 61, L.25.

Notwithstanding Third-Party Plaintiff's allegations to the contrary, the deposition testimony of Mr. Briggs establishes that Exhibits 5 and 7 are "records of regularly conducted activity" used and "kept in the course of a regularly conducted" in the Agri-Credit's financing business. Third-Party Plaintiff's Motion to Strike is curious considering that Mr. Reid, attorney for the Third-Party Plaintiff, deposed Mr. Briggs and marked the documents as exhibits to the record. Further, the foundation for these exhibits was laid by Mr. Briggs during the same deposition.

II. CONCLUSION

For the foregoing reasons, Third-Party Plaintiff's Motion for Summary Judgment should be denied.

DATED this 16th day of June, 2010.

MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED

By _____
Bradley J Williams – Of the Firm
Attorneys for Nicholas Bokides

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of June, 2010, I caused a true and correct copy of the foregoing **NICHOLAS BOKIDES' MEMORANDUM IN OPPOSITION TO THIRD-PARTY PLAINTIFF'S MOTION TO STRIKE** to be served by the method indicated below, and addressed to the following:

Steven R. Fuller STEVEN R. FULLER LAW OFFICE 24 North State P.O. Box 191 Preston, ID 83262 *Attorney for Plaintiff*	( ) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail (X) Facsimile
James G. Reid Laura E. Burri RINGERT LAW CHARTERED 455 S. Third P.O. Box 2773 Boise, ID 83701-2773 Facsimile: (208) 342-4657 *Attorneys for Defendants and Third-Party Plaintiff Roberta Shore*	( ) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail (X) Facsimile
Honorable Mitchell W. Brown District Judge 159 South Main Soda Springs, ID 83276 *Chambers Copy*	( ) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail (X) Facsimile

Bradley J Williams

FILED

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FRANKLIN COUNTY CLERK

Jones

DEPUTY

JAMES G. REID, ISB #1372
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Telephone: (208) 342-4591
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Attorneys for Defendants

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF FRANKLIN

MCCORMICK INTERNATIONAL USA, INC., a corporation Plaintiff, vs. BEAR RIVER EQUIPMENT, INC., a corporation, WILLIAM R. SHORE an individual; and ROBERTA SHORE, an individual, Defendants.	)	Case No. CV 08-327 REPLY MEMORANDUM IN SUPPORT OF THIRD-PARTY PLAINTIFF'S MOTION TO STRIKE
ROBERTA SHORE, an individual, Third-Party Plaintiff, vs.	)	

NICHOLAS BOKIDES, an individual,)
)
Third-Party Defendant.)
*
*
*

In order for Exhibits 5 and 7 of Greg Briggs' deposition to qualify as an exception to the hearsay rule pursuant to I.R.E. 803(6) as claimed by Third-Party Defendant, it is necessary that the exhibits be authenticated pursuant to I.R.E. 901. Unfortunately for Third-Party Defendant, Mr. Briggs, whose deposition is attached to the Affidavit of Third-Party Defendant's counsel is not a person who could authenticate either of the two exhibits.

Mr. Briggs worked for Agri-Credit as a person hired by Agri-Credit engaging in "portfolio management." *See* Briggs Depo. pg. 16. As part of his duties as a portfolio manager he conducted audits of Agri-Credit's dealers including Bear River Equipment. Mr. Briggs did not prepare Exhibits 5 and 7, did not testify in his deposition that the entries were made based upon his personal knowledge, did not testify that the entries were part of a regularly conducted business activity of Agri-Credit and did not testify that he had any knowledge as to the source documents that were used to compile Exhibits 5 and 7, presumably by someone connected with Agri-Credit in St. Louis. In fact, when asked directly, Mr. Briggs responded:

> Q Okay. Who could I talk to to find out how this loan number on Exhibit No. 5 is correlated, the 16103?
> A Either Kevin Peters or Tammy Rafferty, would be my suggestion.

Q And then as I read across – and we'll just stay on the first line of Exhibit No. 5 – the invoice date says 7-16-2006; is that right?
A Yes.
Q Is that telling you that that's when – what happened on that date?
A That was the date that it was invoiced.
Q Meaning what?
A That one of these documents got processed. They received one of these documents, a flooring – or a – whatever this is called – wholesale financing request document, and that it was placed on inventory.
Q Well, does that mean that an invoice was sent to the dealer on that day?
A I'm assuming that's what they do. I – like I say, I'm not involved in that, so –

See Briggs Depo. pg 41 through 42.

From the context of the questions and answers provided by Mr. Briggs in his deposition, it is clear that he is interpreting entries on the documents (which are clearly summaries from information provided in other documents) that someone else other than himself prepared. Therefore, he cannot qualify as the custodian or person with personal knowledge of the preparation of the exhibits and, as such, is not competent pursuant to I.R.E. 901 to authenticate the documents Third-Party Defendant seeks to use as evidence in support of his opposition to Third-Party Plaintiff's Motion for Summary Judgment.

The fact that the documents were used in a deposition or that Mr. Briggs was deposed concerning those documents is of no relevance in determining the documents' admissibility. The admissibility of exhibits 5 and 7 is dependent upon compliance with I.R.E. 803(6) and I.R.E. 901. The submissions by the Third-Party Defendant do not satisfy the Rules of Evidence. On the other hand, Exhibits C, D,

E, F and G to Kevin Peters deposition are the underlying, admissible source documents that clearly evidence when the equipment involved in this litigation was initially floored by Bear River Equipment.

Respectfully submitted this 18 day of June, 2010.

RINGERT LAW CHARTERED

By _____
James G. Reid

CERTIFICATE OF SERVICE

I hereby certify that on the 18 day of June, 2010, a true and correct copy of the foregoing was served upon all parties listed below by:

( ) U. S. mail, postage prepaid ( ) express mail
( ) hand delivery (✓) facsimile

Steven R. Fuller
Steven R. Fuller Law Office
24 North State
P.O. Box 191
Preston, ID 83262

Ed Cather
Moffatt, Thomas
P.O. Box 51505
Idaho Falls, ID 83405-1505

James G. Reid

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF FRANKLIN

* * * * * *

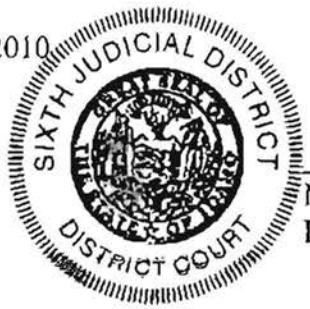
McCORMICK INTERNATIONAL USA, INC.., a corporation Plaintiff, vs. BEAR RIVER EQUIPMENT, INC., a Corporation; WILLIAM R. SHORE, an individual; and ROBERTA SHORE, an individual, Defendants.	Case No. CV-2008-327 MINUTE ENTRY AND ORDER
ROBERTA SHORE, an individual, Third-Party Plaintiff, vs. NICHOLAS BOKIDES, an individual Third-Party Defendant.	

This matter came before the Court regarding Third Party Plaintiff's Motion for Summary Judgment. James G. Reid appeared for and on behalf of Third Party Plaintiff, Roberta Shore and Charles Edward Cather II appeared for and on behalf of Third-Party Defendant, Nicholas Bokides. Steven R. Fuller appeared for and on behalf of Plaintiff, McCormick International USA, Inc. Dorothy Snarr acted as court reporter.

Oral argument was given by counsel and the Court took this matter under advisement and shall issue a decision shortly.

IT IS SO ORDERED.

DATED: June 21, 2010



Mitchell W. Brown

MITCHELL W. BROWN
District Judge

CERTIFICATE OF MAILING/SERVICE

I hereby certify that on June 24, 2010, I mailed/served/faxed a true copy of the foregoing document on the attorney(s)/person(s) listed below by mail with correct postage thereon or causing the same to be hand delivered.

Attorney(s)/Person(s):	Method of Service:
Steven R. Fuller Attorney for Plaintiff	Faxed: 852-2683
James G. Reid Attorney for Roberta Shore	Faxed: (208) 342-4657
Charles Edward Cather III Attorney for Nicholas Bokides	Faxed: 522-5111

V. ELLIOTT LARSEN, Clerk

BY: Linda Hampton
Linda Hampton, Deputy

STEVEN R. FULLER -2995
FULLER & FULLER, PLLC
24 North State
P.O. Box 191
Preston, ID 83263
Telephone: (208) 852-2680
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10 JUN 29 AM 10: 23
FRANKLIN COUNTY CLERK
L Hampton
DEPUTY

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF FRANKLIN

McCORMICK INTERNATIONAL USA, INC., a corporation, Plaintiff, vs. BEAR RIVER EQUIPMENT, INC., a corporation; WILLIAM R. SHORE, an individual; and ROBERTA SHORE, an individual, Defendants.	CASE NO. CV 08-327 **JUDGMENT AND ORDER AGAINST BEAR RIVER EQUIPMENT, INC., WILLIAM R. SHORE AND ROBERTA SHORE**
ROBERTA SHORE, an individual, Third-Party Plaintiff, vs. NICHOLAS BOKIDES, an individual, Third-Party Defendant.	

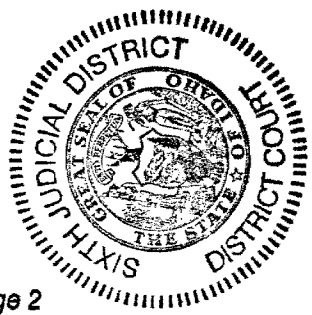
THIS MATTER having come before the Court on the Motion of the Plaintiff, McCormick International USA, Inc., against Bear River Equipment, Inc., William R.

Shore and Roberta Shore, Defendants, for Summary Judgment and the Defendants having collectively filed a "Notice of Non-Opposition to Plaintiff's Motion for Summary Judgment", and the Court being fully apprised in the premises, does hereby order that summary judgment be granted to the Plaintiff, McCormick International USA, Inc., and having found all issues in favor of said Plaintiff against the above-named Defendants and that the Affidavits and matters set forth in the Plaintiff's Motion for Summary Judgment are uncontested and true, and being fully advised in the premises, does hereby enter judgment against Bear River Equipment, Inc., William R. Shore, and Roberta Shore, jointly and severally, as follows:

1. The Plaintiff has judgment against Bear River Equipment, Inc., William R. Shore and Roberta Shore and each of them in the amount of $319,977.98 as of June 25, 2010, together with interest thereon at the judgment rate of 5.625% from the entry of judgment until paid, and attorneys fees and costs incurred by the Plaintiff in this action in the amount of $ to be determined for a total judgment in the amount of $ 319,977.98, together with interest thereon as provided by law on said sum from the date of judgment;

2. Together with such post-judgment attorneys fees and costs as may be incurred in attempting to collect on the judgment pursuant to *Idaho Code* §12-120(5).

DATED this 29th day of June, 2010.



MITCHELL W. BROWN
District Judge

CLERK'S CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **JUDGMENT AND ORDER AGAINST BEAR RIVER EQUIPMENT, INC., WILLIAM R. SHORE AND ROBERTA SHORE** was served on the 29 day of June, 2010.

On:	By:
JAMES G. REID ATTORNEY AT LAW P.O. BOX 2773 BOISE, ID 83701	_____ MAIL, POSTAGE PRE-PAID _____ HAND DELIVERY _____ TELEPHONE FACSIMILE
C. EDWARD CATHER ATTORNEY AT LAW P.O. BOX 51505 IDAHO FALLS, ID 83405	_____ MAIL, POSTAGE PRE-PAID _____ HAND DELIVERY _____ TELEPHONE FACSIMILE
STEVEN R. FULLER ATTORNEY AT LAW PO BOX 191 PRESTON, ID 83263	_____ MAIL, POSTAGE PRE-PAID _____ HAND DELIVERY _____ TELEPHONE FACSIMILE

Linda Hampton

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **PROPOSED JUDGMENT AND ORDER AGAINST BEAR RIVER EQUIPMENT, INC., WILLIAM R. SHORE AND ROBERTA SHORE** was served on the 14th day of June, 2010.

On:	By:
JAMES G. REID ATTORNEY AT LAW P.O. BOX 2773 BOISE, ID 83701	✓ MAIL, POSTAGE PRE-PAID ____ HAND DELIVERY ____ TELEPHONE FACSIMILE
C. EDWARD CATHER ATTORNEY AT LAW P.O. BOX 51505 IDAHO FALLS, ID 83405	✓ MAIL, POSTAGE PRE-PAID ____ HAND DELIVERY ____ TELEPHONE FACSIMILE

STEVEN R. FULLER

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF FRANKLIN

* * * * * *

McCORMICK INTERNATIONAL USA, INC.., a corporation Plaintiff, vs. BEAR RIVER EQUIPMENT, INC., a Corporation; WILLIAM R. SHORE, an individual; and ROBERTA SHORE, an individual, Defendants.	Case No. CV-2008-327 MINUTE ENTRY AND ORDER
ROBERTA SHORE, an individual, Third-Party Plaintiff, vs. NICHOLAS BOKIDES, an individual Third-Party Defendant.	

This matter came before the Court on Defendants' Motion to Disallow Part of Plaintiff's Claimed Costs. Steven R. Fuller appeared telephonically for and on behalf of the Plaintiff, McCormick International USA, Inc. James G. Reid appeared telephonically for and on behalf of the Defendants and the Third-Party Plaintiff, Roberta Shore and Charles Edward Cather II appeared telephonically for Third-Party Defendant, Nicholas Bokides.

The Court has received an Affidavit of Attorney Fees and Costs filed by the Plaintiff and there being no objection the Court will grant Mr. Fuller's request for attorney fees and "costs as a matter of right.".

The Court then heard argument from the parties regarding the discretionary costs with Mr. Reid objecting to the costs. The Court took the matter under advisement and will issue a decision shortly.

IT IS SO ORDERED.

DATED: July 23, 2010

MITCHELL W. BROWN
District Judge

CERTIFICATE OF MAILING/SERVICE

I hereby certify that on August 9, 2010, I mailed/served/faxed a true copy of the foregoing document on the attorney(s)/person(s) listed below by mail with correct postage thereon or causing the same to be hand delivered.

Attorney(s)/Person(s):	Method of Service:
Steven R. Fuller Attorney for Plaintiff	Faxed: 852-2683
James G. Reid Attorney for Roberta Shore	Faxed: (208) 342-4657
Charles Edward Cather III Attorney for Nicholas Bokides	Faxed: 522-5111

V. ELLIOTT LARSEN, Clerk

BY: Linda Hampton
Linda Hampton, Deputy

FILED

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FRANKLIN COUNTY CLERK

L Hampton

DEPUTY

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF FRANKLIN

* * * * * *

McCORMICK INTERNATIONAL USA, INC.., a corporation Plaintiff, vs. BEAR RIVER EQUIPMENT, INC., a Corporation; WILLIAM R. SHORE, an individual; and ROBERTA SHORE, an individual, Defendants.	Case No. CV-2008-327 **MEMORANDUM DECISION AND ORDER ON MOTIONS FOR SUMMARY JUDGMENT**
ROBERTA SHORE, an individual, Third-Party Plaintiff, vs. NICHOLAS BOKIDES, an individual Third-Party Defendant.	

This matter is before the Court on motions for summary judgment filed by the Third-Party Plaintiff and the Third-Party Defendant. Third-Party Defendant, Nicholas Bokides (Bokides) filed his Motion for Summary Judgment with respect to the claims brought against him contained in the Third-Party Complaint. This motion was filed on March 10, 2010. This motion was supported by a Memorandum in Support of Motion for Summary Judgment and the Affidavit of Bradley J.

Williams in Support of Motion for Summary Judgment.[1] On March 24, 2010, Third-Party Plaintiff, Roberta Shore (Roberta) filed Third-Party Plaintiff's Response and Opposition to Third-Party Defendant's Motion for Summary Judgment. Roberta's response was supported by the Affidavit of Bryce Farris.[2] Finally, Bokides filed a Reply Memorandum in Support of Summary Judgment on April 1, 2010. The hearing on Bokides Motion for Summary Judgment was argued to the Court on April 8, 2010. The Court took this matter under advisement.[3]

On May 26, 2010, Roberta filed a Motion for Summary Judgment on her Third-Party Complaint against Bokides. This motion for summary judgment was supported by a Memorandum in Support of Third-Party Plaintiff's Motion for Summary Judgment and the Affidavit of James G. Reid in Support of Motion for Summary Judgment.[4] Bokides filed his Memorandum in Opposition to Third-Party Plaintiff's Motion for Summary Judgment on June 11, 2010. This memorandum was supported by the affidavits of Nicholas T. Bokides and C. Edward Cather.[5] Roberta filed her Reply Memorandum on June 14, 2010.[6] Roberta's Motion for Summary Judgment was argued to the Court on June 21, 2010. Following arguments the Court took the matter under advisement.

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[1] Bradley William's affidavit attached as exhibits to said affidavit, the divorce decree of Roberta Shore and William Shore, Exhibit A, Third-Party Defendant, William Shore's Responses to Third-Party Defendant's First Combined Discovery Requests, Exhibit B, and the Deposition Transcript of Third-Party Plaintiff, Roberta S. "Bobbie" Shore, Exhibit C.

[2] Bryce Farris' affidavit attached an excerpt from the Deposition of Roberta S. "Bobbie Shore, as Exhibit A.

[3] Plaintiff, McCormick International USA, Inc., filed a motion for summary judgment on May 20, 2010. This motion was unopposed by Defendants, Bear River Equipment, Inc. and William and Roberta Shore. Summary Judgment was entered in favor of McCormick International USA, Inc. on June 29, 2010. On May 26, 2010, Roberta, in her capacity as Third-Party Plaintiff moved for summary judgment against Bokides, in light of these pending motions for summary judgment the Court advised the parties that it would consolidate the two motions for summary judgment arising out the Third-Party Complaint. See Minute Entry and Order dated June 10, 2010.

[4] James Reid's Affidavit attached as Exhibits a copy of the Deposition of Roberta S. Bobbie Shore, Exhibit A, and page 14 of Third-Party Defendant's Answers and Responses to Third-Party Plaintiff's Interrogatories, Request for Production and Admissions, Exhibit B.

[5] Edward Cather's Affidavit attached the Deposition transcript of Greg Briggs as Exhibit A.

[6] Roberta also filed a Motion to Strike the Affidavit of C. Edward Cather or at least that portion attempting to introduce into the record on summary judgment Exhibits 5 and 7 to the Deposition of Greg Briggs. The basis for the motion to strike was lack of foundation and hearsay. Various documents were filed both in support of and in

The Court now issues its decision on both Bokides' Motion for Summary Judgment and Roberta's Motion for Summary Judgment.

STANDARD OF REVIEW

A party is entitled to summary judgment when the pleadings, depositions, and admissions, together with any affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Idaho Rule of Civil Procedure 56(c); *Foster v. Traul* 141 Idaho 890, 892, 120 P.3d 278 (2005); *U.S. Bank Nat'l Ass'n v. Kuenzli*, 134 Idaho 222, 225, 999 P.2d 877 (2000).

The standards applicable to summary judgment require the courts to liberally construe the facts in the record in favor of the nonmoving party and to draw all reasonable inferences from the facts in favor of the nonmoving party. *Northwest Bec-Corp. v. Home Living Serv.*, 136 Idaho 835, 838, 41 P.3d 263 (2002). If the record contains conflicting inferences or reasonable minds might reach different conclusions, summary judgment must be denied. *Id.* All disputed facts are to be construed liberally in favor of the nonmoving party, and all reasonable inferences that can be drawn from the records are to be drawn in favor of the nonmoving party. *Barker Mgmt., Inc.*, 137 Idaho 322, 327, 48 P.3d 651, 656 (2002).

Summary judgment is appropriate where the nonmoving party bearing the burden of proof fails to make a showing sufficient to establish the existence of an element essential to that party's case. *Id.* All doubts are to be resolved against the moving party, and the motion must be denied if the evidence is such that one may draw conflicting inferences, and if reasonable people

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opposition to this motion. The Court granted Roberta's Motion to Strike and will not consider Exhibits 5 and 7 to the Deposition of Gregg Briggs on this summary judgment and hereby strikes the same from the record on summary judgment.

might reach different conclusions. *Mackay v. Four Rivers Packing Co.*, 145 Idaho 408, 411, 179 P.3d 1064, 1066-67 (2008). However, where "an action will be tried before the court without a jury, the judge is not constrained to draw inferences in favor of the party opposing a motion for summary judgment but rather the trial judge is free to arrive at the most probable inference to be drawn from uncontroverted evidentiary fact." *Read v. Harvey*, 141 Idaho 497, 499, 112 P.3d 785 (2005).

The fact that both parties have moved for summary judgment does not in and of itself establish that there are or are not genuine issues of material fact. The Court must evaluate each party's motion for summary judgment on its own merits. *Stafford v. Klosterman*, 134 Idaho 205, 207, 998 P.2d 1118 (2000). The burden of establishing that there is no genuine issue of material fact rests at all times upon the moving party. *Jordan v. Beeks*, 135 Idaho 586, 590, 21 P.3d 908 (2001); *Thompson v. City of Idaho Falls*, 126 Idaho 587, 590, 887 P.2d 1094 (Ct.App. 1994). However, once the absence of sufficient evidence on an element has been shown, the burden shifts to the non-moving party to establish a genuine issue of material fact. *Bromley v. Garey*, 132 Idaho 807, 810, 979 P.2d 1165 (1999).

STATEMENT OF FACTS

For purposes of these motions for summary judgment the Court sets forth the following material facts.

1. McCormick International USA, Inc. (McCormick) is a manufacturer of farm equipment. In order to market its equipment, McCormick establishes retail distributor/dealerships with local, but independently owned dealers. In 2005, a dealership with Bear River Equipment, Inc. (Bear River) was created for the retail sale of McCormick tractors and other farm equipment.

2. In order to finance the acquisition of its inventory from McCormick, Bear River entered into agreements with Agricredit which were executed by William Shore (William) and Roberta on behalf of Bear River. Bear River executed an "Inventory Security Agreement" and a "Retail Financing Agreement" with Agricredit on March 22, 2005. As part of the Inventory Security Agreement, Bear River granted to Agricredit a limited power of attorney which provided Agricredit with the authority to execute, on behalf of Bear River, certain documents in the normal course of business, including "Wholesale Financing Requests and Agreements." As Bear River ordered farm equipment from McCormick, the equipment would be financed or floored through Agricredit. Wholesale Financing Agreements would be executed by Bear River through the use of the limited power of attorney. Once the equipment was sold to the customer, the proceeds of the sale were to be placed in a trust account, separate and apart from Bear River's other funds.

3. On March 22, 2005, William and Roberta each separately executed personal guarantees in which they unconditionally and absolutely guaranteed any obligation owed by Bear River to Agricredit.

4. In July and August of 2007 an audit revealed that Bear River had been selling equipment financed through Agricredit, receiving proceeds from the sales but failing to apply said proceeds to its obligation to Agricredit or to place said monies in a trust account as required by the agreements with Agricredit.

5. McCormick and Agricredit had entered into an agreement wherein McCormick agreed to pay Agricredit for amounts financed to McCormick's dealers if Agricredit was unable to collect monies it had paid to dealers for the purchase or flooring of McCormick equipment. By

assignment dated March 14, 2008, Agricredit transferred to McCormick all of its right, title and interest to the obligation owed by Bear River to Agricredit. The personal guarantees referenced in paragraph 3 were part of the all-inclusive rights assigned to McCormick.

6. The Guaranty signed by Roberta contained the following provision:

> And that this shall be a continuing guaranty, and shall cover all the liabilities which the Dealer may incur or come under until AAC shall have received at its Head Office, written notice from the Guarantor or the executor, administrators, successors or assigns of the Guarantor, to make no further advances on the security of this guaranty.

See Affidavit of Kevin Peters, Exhibit L.

7. On August 29, 2008 McCormick filed suit against Bear River as well as William and Roberta in their individual capacities. McCormick moved for summary judgment on May 20, 2010. McCormick's Motion for Summary Judgment was granted June 10, 2010. *See* Minute Entry and Order dated June 10, 2010. Judgment was entered against Bear River, William and Roberta on June 29, 2010 in the sum of $319,977.98. *See* Judgment and Order against Bear River Equipment, Inc., William R. Shore, and Roberta Shore.[7]

8. The Judgment related to five (5) tractors and three (3) loaders. The proceeds from the sale of this equipment were not paid over to Agricredit as required by the agreements between Bear River and Agricredit. The Wholesale Financing Requests and Agreements for each of these items of equipment are listed and identified in the Affidavit of Kevin Peters and are summarized as follows:

[7] McCormick moved for an award of attorney fees and costs. This matter is still pending and will likely result in an amended judgment to reflect the amount of attorney fees and costs awarded to McCormick as a result of obtaining summary judgment in this matter.

Serial No.	Model No.	Date Financed
JJE2026767	MC115 Tractor	10/23/06
JJE3337250	MTX135 Tractor	12/21/06
JJE3337193	MTX120 Tractor	12/21/06
7183970	MCQL145 Loader	12/21/06
JJE2059356	CX105 Tractor	1/04/07
JJE2058843	CX85 Tractor	3/15007
7217799	MCQL165 Loader	5/29/07
7217796	MCQL165 Loader	5/29/07

See Affidavit of Kevin Peters and Exhibits C through G.

9. William and Roberta became involved in a divorce proceeding in Washington County, Idaho. In March, 2006, Roberta retained Bokides to represent her interest in this divorce proceeding. (Depo. Roberta Shore, p.24, LL. 24-25). Roberta advised Bokides that as part of the division of property that she "wanted [Willaim] to have the real property, that [she] wanted him to have full control of the business. I wanted off of everything that had anything to do with it." (Depo. Roberta Shore, p. 26, LL. 8-12).

10. Roberta claims that she gave Bokides the following instructions relative to the personal guarantees with Agricredit:

> Q. Okay. Did he indicate what steps he was going to take to terminate your involvement with Bear River?
>
> A. When I gave him the documents and asked him to send the letters on the guarantees and to do – make – to prepare the deed to transfer the real property, and he just took – I mean made notes like he always did and said that he would take care of it –

(Depo. Roberta Shore, p.26, LL. 17-25).

11. Bokides denies being instructed, prior to entry of the decree of divorce, to prepare deeds or documents to convey Roberta's interest in Bear River to William. However, he acknowledges that all negotiations contemplated William receiving this asset. (Bokides Affidavit, p.2, ¶ 4.

12. Bokides stated in his affidavit as follows:

> I do recall at least one discussion with Roberta, pre-divorce, regarding community debts in general and the debts of Bear River, including her guarantees. There may have been more than on discussion. During the discussion I recall, I advised Roberta that all debts incurred up to the point that a decree of divorce is entered are community debts and that until the decree was entered, I would not take any action to cancel her guarantees. In addition, I informed her that the canceling of a guarantee pre-divorce would be of limited use because the community property of both parties is liable for community debts.
>
> In addition, I would be concerned about how much such a cancellation might affect the business, and if it could impair the business value or cause a creditor to withdraw credit, thereby damaging the business. My concern would be that a court could hold Roberta responsible for damaging the business in those circumstances. Although I do not believe I discussed this legal issue with Roberta, spouses do, up to the point of divorce, have a fiduciary duty to each other, and I would want to give careful thought to taking any action that might impair the ability of the other spouse to operate its business, prior to entry of a decree.
>
> My recollection is that Roberta was satisfied with my explanation of the community nature of these debts, and agreed to wait until the decree was entered to deal with her concerns about her guarantee of the Bear River debts. I do not recall any resistance from Roberta to this advice.
>
> My recollection is it was shortly after the decree was entered that Roberta contacted me and asked that I write letters canceling her guarantee of Bear River debts and I then agreed to do so.
>
> However, I neglected to write the requested termination letter.

Affidavit Nicholas T. Bokides, pp. 2-3, ¶¶ 5-9.

13. The parties' divorce decree was entered on November 16, 2006. *See* Decree of Divorce, Affidavit of Bradley J. Williams, Exhibit A.

14. Only one (1) of the eight (8) pieces of equipment in question in the main litigation involving McCormick and Bear River was financed before the decree of divorce was entered. The remaining seven (7) pieces of equipment were financed after the parties divorce was finalized and the decree of divorce was entered on November 16, 2006.

ANALYSIS

1. Bokides Motion for Summary Judgment

Bokides seeks summary judgment on Roberta's Third-Party Complaint alleging attorney malpractice. The stated basis for this motion for summary judgment is that Roberta has not "suffered any damage resulting from Bokides' negligence." Third-Party Defendant Nicholas Bokides' Memorandum in Support of Motion for Summary Judgment, p.2. Bokides also asserts, as a basis for summary judgment, that "Roberta Shore's claim should be denied for failing to mitigate her damages." *Id.*

A. Has Roberta failed to demonstrate damages sufficient to survive Bokides Motion for Summary Judgment?

The Court will first address Bokides' claim that Roberta has not suffered any damages. Bokides asserts that Roberta cannot meet all of the necessary elements of a claim for legal malpractice. The elements for a civil action for legal malpractice are "(1) the creation of an attorney-client relationship; (2) the existence of a duty on the part of the lawyer; (3) the breach of the duty or standard of care by the lawyer; and (4) the failure to perform the duty was a proximate cause of the damage suffered by the client." *Spur Products Corp. v. Stoel Rives, LLP*, 143 Idaho 812, 815, 153 P.3d 1158, 1162 (2007).

Bokides asserts that Roberta has not been damaged and therefore cannot meet the fourth element that "the failure to perform the duty was a proximate cause of the injuries damages."[8]

However, it is clear that the current posture of this case establishes, at a minimum, that genuine issues of material fact exist on this issue. Roberta has been damaged as a result of Bokides alleged failure to contact Agricredit and advise that she will no longer act as a guarantor for the debts of Bear River. Roberta has had judgment entered against her in the sum of $319,977.98. A significant portion of this judgment arose out of debt incurred by Bear River after the parties were divorced and after Bokides had acknowledged receiving a directive from Roberta to revoke the Guaranty. As such, it cannot be disputed that there are genuine issues of material fact which preclude summary judgment on this issue. There are facts in the record which if accepted by the factfinder could result in a finding that Roberta has suffered damages due to Bokides failure to notify Agrcredit which were the proximate cause of her damages.

Additionally, the Court finds Roberta's argument that an element of damage recoverable in an action for attorney malpractice may include the attorney fees and costs associated with defending an action "where the attorney's alleged malpractice gave rise to the plaintiff's claim." *Fairway Dev. v. Petersen, Moss, Olsen*, 124 Idaho 866, 868-69, 865 P.2d 957, 959-60 (1993) (*Fairway*). The Court recognizes that the discussion in *Fairway* dealt with a determination of when the statute of limitations begins to run with respect to an attorney malpractice claim. However, the discussion and application of the "some damage rule" seems to be equally compelling on summary judgment to establish a genuine issue of fact that the Plaintiff may be able to establish damages to a factfinder.

---

[8] In fairness to Bokides, his Motion for Summary Judgment was filed and argued prior to McCormick having filed its Motion for Summary Judgment and the Court having granted summary judgment.

Based upon the foregoing, the Court concludes that Bokides has failed to establish that Roberta will not be able to, as a matter of law, meet one of the elements necessary for her to establish attorney malpractice. Rather, the evidence before the Court on summary judgment leads to the conclusion that a factfinder, may conclude that Roberta has sustained damage which was proximately caused by Bokides failure to instruct Agricredit that Roberta would no longer guarantee the debts of Bear River. Therefore, the Court will **DENY** Bokides' request for summary judgment on this basis.

B. Is Bokides Entitled to Summary Judgment for Roberta's Failure to Mitigate Damages?

Pursuant to the decree of divorce entered in Washington County, Idaho, William was ordered to "pay when due, and hold [Roberta] harmless from ... all indebtedness related to the closely held corporation Bear River Farm Equipment, Inc., including, but not limited to, any claims or litigation against the parties arising out of the business operated by Bear River Farm Equipment, Inc., including attorney fees and costs."[9]

Bokides argues, that because Roberta has not filed a lawsuit against William or requested that the divorce court to enter an order and judgment against William for his failure to pay this debt incurred by Bear River, that she has failed to mitigate her damages. Bokides asserts that based upon this record, Roberta's Third-Party Complaint should be dismissed as a matter of law.

The Court declines Bokides' request. The question of Roberta's failure to pursue William with respect to the hold harmless provisions of the divorce decree is fraught with genuine issues of material fact sufficient to avoid summary judgment. Bokides' Motion for

[9] None of the parties to this litigation have raised the issue that the party to this litigation if Bear River Equipment, Inc. not Bear River Farm Equipment, Inc. However, since no one has made an issue of this fact, the Court will assume they are one and the same.

Summary Judgment presupposes that such action would result in payment to McCormick. This supposition is obviously seriously in doubt when one considers that William, facing the same lawsuit as Roberta, has failed to pay the obligation. Further, the deposition testimony of Roberta establishes a material question of fact concerning whether obtaining a judgment or order requiring William to hold her harmless would have in effect resulted in William holding her harmless from this lawsuit. Roberta, in her deposition states the following:

> Q. Okay. Now, you have filed this claim against Mr. Bokides to indemnify you and hold you harmless. Why haven't you filed a claim against Bill Shore to indemnify you and hold you harmless?
>
> A. Because that would do no good in stopping McCormick from coming after me as Mr. Bokides explained to me when I went in to see him when I received the demand letter. And he said it doesn't matter what the divorce decree says because that's between Bill and me. It has nothing to do with any other company. And they can come after me because of that guaranty that I didn't get off of.
>
> Q. Okay. So if this is correct, my understanding is that you did not file against Bill because it would not stop McCormick from suing you.
>
> A. Yes.
>
> Q. Okay. So I guess my same question then would be, based on that, how is filing against Mr. Bokides going to stop McCormick from coming after you?
>
> A. I did not want to do this. It was the last thing I wanted to do. I waited as long as Mr. Reid thought we could because Bill was trying to settle it. Bill had been able to settle five or six other suits of this nature up to this point, but in doing so exhausted all of his assets. McCormick's, this particular one just happened to be the last one

Depo. Roberta Shore, p. 44, LL. 4-25, p. 45, LL. 1-9.

The Court can reach no other conclusion but to deny Bokides Motion for Summary Judgment on the present record. When construing the evidence in a light most favorable to Roberta and construing all reasonable inferences in her favor, which the Court must do on

summary judgment, the Court must conclude that there are genuine issues of material fact which preclude summary judgment. There are issues of fact which if accepted by the trier of fact could reasonably support a finding that based upon William' financial status it would have been or is fruitless to pusue him under this hold harmless clause. It just may be that he is judgment proof. In fact, this may be precisely why McCormick is looking to Roberta on the Guaranty. Nevertheless, these are issues that will need to be resolved at trial, by the factfinder, rather than at summary judgment. Therefore, the Court will **DENY** Bokides' Motion for Summary Judgment to the extent that he seeks summary judgment on the basis that Roberta has failed to mitigate her damages.

For the foregoing reasons, the Court **DENIES** Bokides' Motion for Summary Judgment.

2. Roberta's Motion for Summary Judgment.

Roberta has also moved for summary judgment on her Third-Party Complaint against Bokides. She argues that the record before the Court on summary judgment supports her claim for summary judgment on her Third-Party Complaint. Roberta asserts that she gave Bokides copy of the Guaranty in May, 2007 and requested that he notify Agricredit that she would no longer be obligated on the Guaranty. Depo. Roberta Shore, p. 33, LL. 17-22. She further asserts that he agreed he would notify Agricredit of this fact. *Id.* at p. 34, LL. 11-13. However, this fact is in dispute. Bokides asserts that he did not agree to notify Agricredit of Roberta's termination of the Guaranty in May of 2006. Rather, he states that he advised her against terminating the Guaranty before the divorce was final and that he would not take action to terminate the Guaranty until then. Affidavit of Nicholas T. Bokides, pp. 2-3, ¶ 5. He states that his recollection was that "Roberta was satisfied with my explanation of the community nature of

these debts, and agreed to wait until the decree was entered to deal with her concerns about her guarantee of the Bear River debts. *Id.* p.3, ¶ 7.

Bokides does acknowledge that after the divorce was finalized he was contacted by Roberta concerning the Guaranty and was instructed to terminate the same. He also acknowledges that he agreed to do so at that time. *Id.* p.3, ¶ 8. However, he argues that there was no time limit imposed or discussed concerning when this should occur. He acknowledges that he never notified Agricredit of Roberta's intent to terminate the Guaranty. *Id.* p.3, ¶ 9.

As a result of the foregoing, the Court determines that there are genuine issues of material fact concerning Bokides' duty to notify Agricredit of Roberta's termination of the Guaranty. These issues of fact include, but are not limited to, when that duty arose and when the performance of that duty was to have been completed. There are also genuine issues of material fact regarding Bokides' duty and the timing concerning when that duty arose, when it was to be completed and when Roberta became obligated as a Guarantor on the eight (8) pieces of equipment in question. This issues directly involves whether or not Bokikdes failure to notify Agricredit of Roberta's termination of the Guaranty was a proximate cause of her damages.

The Court also concludes that there are genuine issues of material fact concerning whether or not Roberta has mitigated her damages. In this Court's mind there are genuine issues of material fact that are unresolved on the record before the Court concerning whether or not Roberta could have or should have pursued William pursuant to the divorce decree and the hold harmless provision, or whether this would merely have been an exercise in futility.

Based upon the foregoing, the Court concludes that there are genuine issues of material fact which preclude the entry of summary judgment on Roberta's Third-Party Complaint.

Construing the facts in a light most favorable to the non-moving party, in this instance Bokides, the Court concludes that there are genuine issues of fact concerning when his duty arose and when he was to have performed the duty, that if accepted by the finder of fact may result in a finding that he is not liable for some or all of the damages claimed by Roberta.

Further, genuine issues of material fact remain regarding the amount of attorney fees incurred by Roberta in her defense of the underlying claim with McCormick. As such this issue relative to the nature and extent of damages still must be resolved at trial.

For the foregoing reasons, the Court hereby **DENIES** Roberta's Motion for Summary Judgment on her Third-Party Complaint.

CONCLUSION

Based upon the above, the Court hereby **DENIES** both parties' motions for summary judgment. The original claim brought by McCormick against Bear River, William and Roberta, has been resolved by way of summary judgment. Therefore, the Third-Party Complaint filed by Roberta against Bokides will proceed to trial as scheduled on August 24, 2010.

IT IS SO ORDERED.

Dated this 28th day of July, 2010.

MITCHELL W. BROWN
District Judge

CERTIFICATE OF MAILING/SERVICE

I hereby certify that on July 29, 2010, I mailed/served/faxed a true copy of the foregoing document on the attorney(s)/person(s) listed below by mail with correct postage thereon or causing the same to be hand delivered.

Attorney(s)/Person(s):	Method of Service:
Steven R. Fuller Attorney for Plaintiff	Faxed: 852-2683
James G. Reid Attorney for Roberta Shore	Faxed: (208) 342-4657
Charles Edward Cather III Attorney for Nicholas Bokides	Faxed: 522-5111

V. ELLIOTT LARSEN, Clerk

BY: Linda Hampton
Linda Hampton, Deputy

TRANSACTION REPORT

JUL/29/2010/THU 08:25 AM

FAX(TX)

#	DATE	START T.	RECEIVER	COM.TIME	PAGE	TYPE/NOTE	FILE
001	JUL/29	08:22AM	8522683	0:02:28	16	OK SG3	3958

TRANSACTION REPORT

JUL/29/2010/THU 08:29 AM

FAX(TX)

#	DATE	START T.	RECEIVER	COM.TIME	PAGE	TYPE/NOTE	FILE
001	JUL/29	08:27AM	5225111	0:02:20	16	OK SG3	3960

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10 AUG -4 AM 9:27

FRANKLIN COUNTY CLERK

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Attorneys for Nicholas Bokides

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF FRANKLIN

McCORMICK INTERNATIONAL USA, INC., a corporation, Plaintiff, vs. BEAR RIVER EQUIPMENT, INC., a corporation; WILLIAM R. SHORE, an individual; and ROBERTA SHORE, an individual, Defendants.	Case No. CV 08-327 **JOINT PRE-TRIAL STIPULATION**

ROBERTA SHORE, an individual,

Third-Party Plaintiff,

vs.

NICHOLAS BOKIDES, an individual

Third-Party Defendant,

COME NOW, Roberta Shore, third-party plaintiff, and Nicholas Bokides, third-party defendant, by and through undersigned counsel, pursuant to the Court's April 9, 2010 *Scheduling Order, Notice of Trial Setting & Initial Pretrial Order*, and hereby file this Joint Pre-trial Stipulation.

A. Nature of the Action:

Third-Party Plaintiff Roberta Shore has brought a legal malpractice action against Third-Party Defendant Nicholas Bokides.

The parties each agree that: 1) Roberta Shore personally guarantied the obligations of Bear River Equipment, Inc. ("Bear River") to Agri-Credit Corporation ("Agri-Credit") and McCormick International USA, Inc. ("McCormick'); 2) Nicholas Bokides ("Bokides") represented Roberta Shore in divorce proceedings against William Shore; 3) Bokides agreed to notify Agri-Credit and McCormick in writing that Roberta Shore would no longer be a guarantor for the obligations of Bear River; 4) Bokides failed to notify Agri-Credit as agreed; and 5) the obligations which form the gravamen of McCormick's claims against Roberta Shore were the obligations of Bear River.

On June 29, 2010, the Court entered a judgment in favor of McCormick in the amount of $319,977.98 against Roberta Shore and William Shore. Interest continues to accrue

on the judgment at the rate of 5.625% per annum until satisfied. McCormick's motion for an award of attorney's fees and costs in the amount of $24,259.25 is pending before the Court.

B. A statement of the issues of law which remain to be litigated at the trial:

1. When the parties agreed that Bokides would notify Agri-Credit and McCormick that Roberta Shore would no longer guaranty the obligations of Bear River. Third-Party Plaintiff's Burden

2. The amount of liability arising from Bokides' failure to notify Agri-Credit and McCormick. Third-Party Plaintiff's Burden

3. Whether Roberta Shore mitigated her damages. Specifically, whether William Shore is able to satisfy any portion of the judgment or was pursuing a claim against him futile. There is a dispute between the parties as to who has the burden of proof

C. Mediation:

Parties, and their representative counsel, have, in good faith, attempted to settle this matter and have unsuccessfully completed court ordered mediation.

D. Discovery:

All pre-trial discovery procedures under I.R.C.P 26 through 37 have been complied with and all discovery responses have been supplemented as required by the rules to reflect facts known as of the date of this Stipulation.

E. Orders on all matters which will expedite the trial:

The trial of this matter will be expedited by the Court's ruling on the following: Motions in limine regarding evidence to be introduced at trial.

F. Admissions or stipulations of the parties:

The parties agree and stipulate that the evidence, including but not limited to testimony by affidavits, exhibits and documents, submitted by McCormick in support of its Motion for Summary Judgment may be introduced in this matter without further authentication

or offered in lieu of live testimony. The parties have not identified any other stipulated admissions.

G. Descriptive list of Exhibits proposed to be offered in evidence:

The parties continue to work toward a final list of stipulated trial exhibits, and each hereby reserves the right to amend the following list of exhibits:

1. Third-Party Plaintiff

No.	Description	By Stip	Offered	Admitted	Refused	Reserve Ruling
1.	Decree of Divorce, Deposition of Roberta Shore, Exhibit 3					
2.	Guaranty Agreement, Deposition of Roberta Shore, Exhibit 2					
3.	Guaranty, Deposition of Roberta Shore, Exhibit 1					
4.	Agreement to Indemnify, Deposition of Roberta Shore, Exhibit 4					
5.	Bokides's Office File for Roberta Shore, NTBokdies 0086-0414					
6.	August 30, 2007 Demand Letter					
7.	Memorandum Decision in Shore v. Peterson					
8.	Idaho State Tax Commission Deficiency Notices					
9.	Internal Revenue Service Deficiency Notices					
10.	Merrill & Merrill Bill for Attorney Fees					
11.	Closing Documents for Sale of Ranch					
12.	Agreement for Purchase of Preston Property					
13.	Mortgage on Ranch, NTBokides0011-0013					
14.	February 2010 Financial Statement of Bill Shore, Deposition of William Shore, Exhibit 2					

Third-Party Plaintiff shall not offer any exhibits at the trial other than those listed in above, except when offered for impeachment purposes or when otherwise permitted by the trial court in the interest of justice.

2. Third-Party Defendant

In addition to the exhibits identified by third-party plaintiff above, all or a portion of which third-party defendant may also introduce as part of their case-in-chief or as rebuttal exhibits at trial, third-party defendant may offer the following exhibits:

No.	Description	By Stip	Offered	Admitted	Refused	Reserve Ruling
A.	Exhibits to May 20, 2010 Affidavit of Kevin Peters					
B.	Wholesale Financing Requests and Agreements, Exhibits C, D, E, F and G to May 20, 2010 Affidavit of Gregg Briggs					
C.	Guaranty, Exhibit K to May 20, 2010 Affidavit of Gregg Briggs					
D.	Retail Financing Agreement, Exhibit B to May 20, 2010 Affidavit of Gregg Briggs					
E.	McCormick International USA Retailer Distributer Agreement, Exhibit A to May 20, 2010 Affidavit of Jean Crosbey					
F.	McCormick USA Retail Distributor Policy, Exhibit B to May 20, 2010 Affidavit of Jean Crosbey					
G.	McCormick USA Retail Distributor Policy, Exhibit B to May 20, 2010 Affidavit of Jean Crosbey					
H.	Security Agreement, Exhibit C to May 20, 2010 Affidavit of Jean Crosbey					
I.	Guaranty Agreement, Exhibit D to May 20, 2010 Affidavit of Jean Crosbey					
J.	Agreement to Indemnify, Exhibit 4 to Deposition of Roberta Shore					
K.	Decree of Divorce, Exhibit 3 to Deposition of Roberta Shore					
L.	Equipment List, Deposition of William Shore, Exhibit 3					
M.	March 2006 Asset List, Deposition of William Shore, Exhibit 4					
N.	List of Antique Car, Deposition of William Shore, Exhibit 5					
O.	Broker Price Opinion, Deposition of William Shore, Exhibit 6					
P.	February 2005 Financial Statement of Bill Shore, NTBoldies 0132					

No.	Description	By Stip	Offered	Admitted	Refused	Reserve Ruling
Q.	Order Amending Decree of Divorce, NTBokdies 0193-0194					

Third-Party Defendant shall not offer any exhibits at the trial other than those listed in above, except when offered for impeachment purposes or when otherwise permitted by the trial court in the interest of justice.

H. List of the names and addresses of all witnesses, except impeachment witnesses:

1. Third-Party Plaintiff:

Plaintiffs will call the following witnesses:

Witness:	Address:
Roberta Shore	c/o Ringert Law Chartered 455 S. Third P.O. Box 2773 Boise, ID 83701-2773
William Shore	c/o Ringert Law Chartered 455 S. Third P.O. Box 2773 Boise, ID 83701-2773
Nicholas Bokides	c/o Moffatt, Thomas, Barrett, Rock & Fields, Chartered 420 Memorial Drive Post Office Box 51505 Idaho Falls, Idaho 83405

Depositions or discovery responses will not be offered in lieu of live testimony.

2. **Third-Party Defendant:**

Witness:	**Address:**
Nicholas Bokides	c/o Moffatt, Thomas, Barrett, Rock & Fields, Chartered 420 Memorial Drive Post Office Box 51505 Idaho Falls, Idaho 83405
Roberta Shore	c/o Ringert Law Chartered 455 S. Third P.O. Box 2773 Boise, ID 83701-2773
William Shore	c/o Ringert Law Chartered 455 S. Third P.O. Box 2773 Boise, ID 83701-2773

Depositions or discovery responses will not be offered in lieu of live testimony.

DATED this 3rd day of August, 2010.

RINGERT LAW CHARTERED

By_____
James G. Reid – Of the Firm
Attorneys for Roberta Shore and William Shore

MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED

By_____
Bradley J Williams – Of the Firm
Attorneys for Nicholas Bokides

2. **Third-Party Defendant:**

Witness:	**Address:**
Nicholas Bokides	c/o Moffatt, Thomas, Barrett, Rock & Fields, Chartered 420 Memorial Drive Post Office Box 51505 Idaho Falls, Idaho 83405
Roberta Shore	c/o Ringert Law Chartered 455 S. Third P.O. Box 2773 Boise, ID 83701-2773
William Shore	c/o Ringert Law Chartered 455 S. Third P.O. Box 2773 Boise, ID 83701-2773

Depositions or discovery responses will not be offered in lieu of live testimony.

DATED this 3rd day of August, 2010.

RINGERT LAW CHARTERED

By_____
James G. Reid – Of the Firm
Attorneys for Roberta Shore and William Shore

MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED

By_____
Bradley J. Williams – Of the Firm
Attorneys for Nicholas Bokides

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of August, 2010, I caused a true and correct copy of the foregoing **JOINT PRE-TRIAL STIPULATION** to be served by the method indicated below, and addressed to the following:

Steven R. Fuller STEVEN R. FULLER LAW OFFICE 24 North State P.O. Box 191 Preston, ID 83262 *Attorney for Plaintiff*	( ) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail (X) Facsimile
James G. Reid Laura E. Burri RINGERT LAW CHARTERED 455 S. Third P.O. Box 2773 Boise, ID 83701-2773 Facsimile: (208) 342-4657 *Attorneys for Defendants and Third-Party Plaintiff Roberta Shore*	( ) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail (X) Facsimile
Honorable Mitchell W. Brown District Judge 159 South Main Soda Springs, ID 83276 *Chambers Copy*	( ) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail (X) Facsimile

Bradley J Williams

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FRANKLIN COUNTY CLERK

DEPUTY

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF FRANKLIN

* * * * * *

McCORMICK INTERNATIONAL USA, INC., a corporation Plaintiff, vs. BEAR RIVER EQUIPMENT, INC., a Corporation; WILLIAM R. SHORE, an individual; and ROBERTA SHORE, an individual, Defendants.	Case No. CV-2008-327 **MEMORANDUM DECISION AND ORDER ON McCORMICK INTERNATIONAL USA INC.'S REQUEST FOR ATTORNEY FEES AND COSTS**
ROBERTA SHORE, an individual, Third-Party Plaintiff, vs. NICHOLAS BOKIDES, an individual Third-Party Defendant.	

This matter is before the Court on McCormick International USA, Inc.'s (McCormick) request for attorney fees and costs. McCormick submitted a Memorandum of Costs and Attorney Fees and an Affidavit of Attorney Fees and Costs in support of its request. Bear River Equipment, Inc., William Shore, and Roberta Shore (Defendants) filed Defendants' Motion to Disallow Part of the Plaintiff's Claimed Costs. In response McCormick submitted its Objection to Defendants' Motion to Disallow Part of Plaintiff's Claimed Costs. This matter was argued to

the Court on July 23, 2010. Following arguments, the Court took this matter under advisement. The Court now issues its decision.

BACKGROUND

On August 29, 2008 McCormick filed suit against Bear River Equipment, Inc. as well as William Shore and Roberta Shore in their individual capacities. McCormick moved for summary judgment on May 20, 2010. McCormick's Motion for Summary Judgment was granted June 10, 2010. *See* Minute Entry and Order dated June 10, 2010. Judgment was entered against Bear River Equipment, Inc., William Shore and Roberta Shore on June 29, 2010 in the sum of $319,977.98. *See* Judgment and Order against Bear River Equipment, Inc., William R. Shore, and Roberta Shore.

McCormick now seeks an award of attorney fees and costs, as the prevailing party to this litigation, under Rule 54 (d) and (e) of the Idaho Rules of Civil Procedure as well as Idaho Code § 12-120(3) and the express provisions of the parties' contract. Defendants acknowledged at the hearing on July 23, 2010 that McCormick is entitled to an award of attorney fees pursuant to Idaho Code § 12-120(3) and the express terms of their contract. Defendants also acknowledged that the sum of $21,967.00 requested by McCormick for attorney fees was reasonable. Therefore the Court **GRANTED** McCormick's request for attorney fees in the amount of $21,967.00

The Defendants advised that they agreed that McCormick was entitled to an award of costs, specifically costs as a matter of right, pursuant to Rule 54(d)(1)(C) of the Idaho Rules of Civil Procedure. However, they disputed that "travel to and from Boise (618) miles" in the amount of $410.00 should be included as a "cost as a matter of right" pursuant to I.R.C.P. 54(d)(1)(C). McCormick acknowledged that this claimed cost should not be categorized as a

"cost as a matter of right" but rather should be categorized as a discretionary cost under Rule 54(d)(1)(D). As a result, Defendants acknowledged that McCormick was entitled to "costs as a matter of right" in the amount of $472.49 pursuant to I.R.C.P. 54(d)(1)(C).

Therefore, the only issue remaining for the Court to resolve is whether McCormick is entitled to an award of discretionary costs pursuant to I.R.C.P. 54(d)(1)(D).

DISCRETIONARY COST

The Idaho Rules of Civil Procedure 54(d)(1)(A) provide, in relevant part, that:

> Except when otherwise limited by these rules, costs shall be allowed as a matter of right to the prevailing party or parties, unless otherwise ordered by the court.

Normally, a Court faced with this issue must first make a determination concerning whether there is a prevailing party and if so who is the prevailing party. This analysis is controlled by Rule 54(d)(1)(B) of the Idaho Rules of Civil Procedure and the case law interpreting this rule. The determination on the issue of whether one is a prevailing party is left to the discretion of the trial court. *Eighteen Mile Ranch, LLC v. Nord Excavating & Paving, Inc.*, 141 Idaho 716, 718-19, 117 P.3d 130, 132-33 (2005).

However, in this case, all parties have acknowledged that McCormick is the prevailing party to this litigation and is entitled to an award of attorney fees and costs, at least "costs as a matter of right." As such the Court need not analyze or address the standards for a prevailing party.

Rule 54(d)(1)(D) of the Idaho Rules of Civil Procedure discusses discretionary costs. It provides, in relevant part, as follows:

> Additional items of cost not enumerated in, or in an amount in excess of that listed in subparagraph (C), may be allowed upon a showing that said costs were necessary and exceptional costs reasonably incurred, and should in the interest of

> justice be assessed against the adverse party. The trial court, in ruling upon objections to such discretionary costs contained in the memorandum of costs, shall make express findings as to why such specific item of discretionary cost should or should not be allowed.

An award of discretionary costs under I.R.C.P. 54(d)(1)(D) is committed to the discretion of the trial court. *Great Plains Equip. v. Northwest Pipeline*, 136 Idaho 466, 474, 36 P.3d 218 (2001). The Court "will be deemed to be acting within the bounds of its discretion even though it may not evaluate the costs item by item if the court makes 'express findings as required by I.R.C.P. 54(d)(1)(D) with regard to the general character of the requested costs.'" *Id.* at 474.

In the present case, McCormick has requested discretionary costs in the amount of $1,409.76. *See* Objection to Defendants' Motion to Disallow Part of Plaintiff's Claimed Costs, p.2. These claimed discretionary costs include UCC Lien Search, Lien Searches, Postage charges, Copy Charges, Lodging and Meals for travel to Boise and Idaho Falls, and mileage for travel to and from Boise and Idaho Falls.

I.R.C.P. 54(d)(1)(D) provides that discretionary costs "may be allowed upon a showing that said costs were necessary and exceptional costs reasonably incurred." In the present case the Court has no doubt but that the claimed discretionary costs were necessary and reasonably incurred. However, the Court cannot find that they were exceptional in any way. Rather, they appear to be normal routine costs associated with overhead or doing business in a law firm that litigates cases.

McCormick argues that the discretionary costs it claims in this matter were "necessary and exceptional." Although this Court believes that said costs were necessary, the Court, upon review of the record, can identify nothing about the discretionary costs that makes them exceptional. If the mere fact that a party was required to travel to attend and participate in a

deposition were sufficient to meet the exceptional prong of the discretionary costs, recovery of this type of cost would become the norm and would logically be included as a cost as a matter of right. However, it is not included as a cost as a matter of right, and requires some factual showing by the party requesting the same, that it is exceptional under the facts and circumstances of the present case. In this Court's assessment, no such showing has been demonstrated in the case at bar.

McCormick also asserts that the "interests of justice" demand that an award of discretionary costs be assessed in the present case. The argument asserted in this respect is that the present litigation has been protracted. McCormick asserts that a great deal of discovery has been conducted which culminated in McCormick's summary judgment. This summary judgment was not opposed by the Defendants; rather they allowed summary judgment to be entered unopposed. Because Defendants did not oppose summary judgment, McCormick concludes that Defendants were conceding that "there were no legitimate defenses to the claim[s] of the Plaintiff." Objection to Defendants' Motion to Disallow Part of Plaintiff's Claimed Costs, p.5. While this may be true, Defendants argue that it was only after completing the discovery and discovering all of the facts associated with McCormick's claims that they ascertained that the amounts claimed by McCormick were accurate and that there was no defense in law or fact to McCormick's claim. In this Court's view this is how the litigation process is intended to work. Certainly Defendants are to be commended for their conduct in not opposing a summary judgment which they believed, after completing discovery, to be meritorious.

On this record the Court will **DENY** McCormick's claim for discretionary costs in the amount of $1,409.72 concluding that there are insufficient facts to establish that these claimed

discretionary costs were exceptional under I.R.C.P. 54(d)(1)(D).

CONCLUSION

Based upon the foregoing, upon submission by McCormick of an appropriate form of judgment, the Court will sign an amended judgment granting McCormick judgment in the sum of $319,977.93 as of June 25, 2010, together with interest thereon at the judgment rate of 5.625%, plus judgment in the amount of $22,439.49 for attorney fees and costs, for a total judgment of $342,417.42.

IT IS SO ORDERED.

Dated this 8th day of August, 2010.

MITCHELL W. BROWN
District Judge

CERTIFICATE OF MAILING

I hereby certify that on August 9, 2010, I mailed/served/faxed a true copy of the forgoing document on the attorney(s)/person(s) listed below by mail with correct postage thereon or by facsimile transmission or by causing the same to be hand delivered.

Attorney(s)/Person(s):	Method of Service:
Steven R. Fuller Attorney for Plaintiff	Faxed: 852-2683
James G. Reid Attorney for Defendants Bear River Equipment Inc., William Shore, and Roberta Shore	Faxed (208) 342-4657
Charles Edward Cather III Attorney for Nicholas Bokides	Faxed 522-5111

Linda Hampton

TRANSACTION REPORT

AUG/09/2010/MON 08:26 AM

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TRANSACTION REPORT

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LHampton
DEPUTY

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF FRANKLIN

McCORMICK INTERNATIONAL USA, INC., a corporation, Plaintiff, vs. BEAR RIVER EQUIPMENT, INC., a corporation; WILLIAM R. SHORE, an individual; and ROBERTA SHORE, an individual, Defendants.	CASE NO. CV 08-327 **AMENDED JUDGMENT AND ORDER AGAINST BEAR RIVER EQUIPMENT, INC., WILLIAM R. SHORE AND ROBERTA SHORE**
ROBERTA SHORE, an individual, Third-Party Plaintiff, vs. NICHOLAS BOKIDES, an individual, Third-Party Defendant.	

THIS MATTER having come before the Court on the Motion of the Plaintiff,

McCormick International USA, Inc., against Bear River Equipment, Inc., William R. Shore and Roberta Shore, Defendants, for Summary Judgment and the Defendants having collectively filed a "Notice of Non-Opposition to Plaintiff's Motion for Summary Judgment", and the Court being fully apprised in the premises, does hereby order that summary judgment be granted to the Plaintiff, McCormick International USA, Inc., and having found all issues in favor of said Plaintiff against the above-named Defendants and that the Affidavits and matters set forth in the Plaintiff's Motion for Summary Judgment are uncontested and true, and being fully advised in the premises, does hereby enter judgment against Bear River Equipment, Inc., William R. Shore, and Roberta Shore, jointly and severally, as follows:

1. The Plaintiff has judgment against Bear River Equipment, Inc., William R. Shore and Roberta Shore and each of them in the amount of $319,977.98 as of June 25, 2010, together with interest thereon at the judgment rate of 5.625% from the entry of judgment until paid, and attorneys fees and costs incurred by the Plaintiff in this action in the amount of $22,439.49 for a total judgment in the amount of $342,417.42, together with interest thereon as provided by law on said sum from the date of judgment;

2. Together with such post-judgment attorneys fees and costs as may be incurred in attempting to collect on the judgment pursuant to *Idaho Code* §12-120(5).

DATED this 12th day of August, 2010.

SIXTH JUDICIAL DISTRICT
DISTRICT COURT

Mitchell W. Brown
MITCHELL W. BROWN
District Judge

CLERK'S CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **AMENDED JUDGMENT AND ORDER AGAINST BEAR RIVER EQUIPMENT, INC., WILLIAM R. SHORE AND ROBERTA SHORE** was served on the 13 day of August, 2010.

On:	By:
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IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF FRANKLIN

MCCORMICK INTERNATIONAL USA, INC., a corporation Plaintiff, vs. BEAR RIVER EQUIPMENT, INC., a corporation, WILLIAM R. SHORE an individual; and ROBERTA SHORE, an individual, Defendants.	Case No. CV 08-327 **THIRD PARTY PLAINTIFF'S PRE-TRIAL BRIEF**
ROBERTA SHORE, an individual, Third-Party Plaintiff, vs. NICHOLAS BOKIDES, an individual, Third-Party Defendant.	

480

COMES NOW Third Party Plaintiff, Roberta Shore (hereinafter"Roberta Shore"), by and through their attorneys of record, Ringert Law Chartered, and hereby submits this Pre-Trial Brief for the trial set to begin on August 24, 2010.

I. INTRODUCTION

On July 29, 2010, the Court issued a *Memorandum Decision and Order on Motions for Summary Judgment*, which framed and clarified most of the issues remaining in this case. The Court outlined the facts which are not in dispute, the material issues of fact which remain in dispute and clarified many of the legal issues. In order to avoid unnecessary redundancy, Roberta Shore will incorporate the Court's *Memorandum Decision* as much as possible in this Pre-Trial Brief.

II. FACTS NOT IN DISPUTE

As set forth in the Court's *Memorandum Decision*, and as established in the underlying case filed by McCormick International USA, Inc. (McCormick), paragraphs one through eight of the Court's Statement of Facts are not in dispute and thus are not at issue at the trial. These facts are either not disputed or have been proven in the underlying case, and this Court has relied upon such facts for purposes of granting summary judgment in favor of McCormick, and subsequently entered judgment in favor of McCormick.

III. FACTS IN DISPUTE

As indicated in the parties Joint Pre-Trial Stipulation, the first issue in dispute is when the parties agreed Bokides would notify Agri-Credit and McCormick that Roberta Shore would no longer guaranty the obligations of Bear River. There is no dispute that Bokides would notify Agri-Credit and McCormick, and there is no dispute that he failed to do so, but there is a dispute between Roberta Shore and Bokides as to when Bokides agreed to do so. This issue will be resolved by the

testimony of Roberta Shore and Bokides.

The second issue in dispute is the amount of liability arising from Bokides' failure to notify Agri-Credit and McCormick. As Roberta Shore understands Bokides' latest position as set forth in his affidavit, Bokides was going to notify Agri-Credit and McCormick at the time the divorce was final and he acknowledges he failed to do so. The Divorce Decree was entered on November 16, 2006 and it is undisputed that only one of the pieces of equipment that is the subject of this lawsuit was financed before the Divorce Decree was entered. The other "seven (7) pieces of equipment were financed after the parties divorce was finalized and the decree of divorce was entered on November 16, 2006." *Memorandum Decision*, ¶ 14, pg. 9. Thus, even under Bokides' version of the facts, his failure to notify Agri-Credit and McCormick after the divorce was finalized resulted in Roberta Shore being obligated under her personal guaranty for seven of the pieces of equipment and she has been at a minimum damaged as to the seven pieces of equipment as a result of Bokides' neglect. The only question as to liability and damages concerns the eighth piece of equipment which was financed before the divorce was final. Whether Bokides is also liable for the eighth piece of equipment turns upon this Court's resolution of the first issue as to when the parties agreed Bokides would notify Agri-Credit and McCormick that Roberta Shore would no longer guaranty the obligations of Bear River.

IV. LEGAL ISSUES

1. Burden of Proof.

The primary legal issue remaining in this case involves mitigation of damages. This Court denied Bokides' motion for summary judgment on the issue because "[t]he question of Roberta's failure to pursue William with respect to the hold harmless provisions of the divorce decree is

fraught with genuine issues of material fact sufficient to avoid summary judgment." *Memorandum Decision*, pg. 11. Notwithstanding those issues of fact, there remains legal issues regarding whether the affirmative defense of failure to mitigate damages is before the Court and, if so, which party bears the burden on the issue.

Mitigation of damages is defined by IDJI2d 9.14 as follows: "Any person who has been damaged must exercise ordinary care to minimize the damage and prevent further damage. Any loss that results from a failure to exercise such care cannot be recovered." The assertion of failure to mitigate damages is an affirmative defense, which under I.R.C.P. 8(c), a party must set for in his or her pleading any affirmative defenses to the other party's pleading. *See Taylor v. Browning*, 129 Idaho 483, 927 P.2d 873 (1996).[1] Idaho courts have consistently held that the burden of proof lies with the party asserting the affirmative defense. More specifically, the burden of proof as to mitigation of damages is on the party causing the alleged damages, Bokides in this instance. *See Davis v. First Interstate Bank*, 115 Idaho 169, 765 P.2d 680 (1988); *Eliopulos v. Kondo Farms, Inc.*, 102 Idaho 915, 643 P.2d 1085 (Ct. App. 1982). Thus, the burden is on Bokides to prove that Roberta Shore did not exercise reasonable care to mitigate her damages.

2. **Evidence of Legal Decision to Sue William Shore or William Shore's Finances.**

The other legal issue involving mitigation of damages is whether or not, as a matter of law, a party must pursue legal action against a third party, namely William Shore, before a party can pursue an independent party based upon negligence. This Court denied Bokides' motion for summary judgment on the issue because it was fraught with factual issues, but Roberta Shore

[1] In this case, Bokides has failed to specifically set forth the affirmative defense of failure to mitigate damages in his Answer to Third-Party Complaint. That said, to the extent the issue is before the Court, it still should be considered an affirmative defense raised by Bokides.

maintains that the issue may not be raised as a matter of law because she cannot be mandated to bring an action against William Shore in order to maintain her claim against Bokides.

Any claim Roberta Shore would have against William Shore would be based upon contract while her claim against Bokides stems from negligence. Bokides is suggesting that Roberta Shore must pursue William Shore before she can bring an action against him. While the reasonableness of one's actions is at issue on a claim of failure to mitigate, one cannot be required as a matter of law that one bring a separate lawsuit. This is not a situation of a compulsory counterclaim or joint tortfeasor, and there is no compulsory requirement to be found in Idaho law. If this were the case then the contrary argument would also be applicable, and William Shore could argue that Roberta Shore could not pursue him until she "mitigates" her damages and first pursues Bokides. For that matter, Roberta Shore could argue that McCormick should pursue Bear River Farm Equipment, Inc. and William Shore before McCormick should be allowed to obtain a judgment against Roberta Shore. The road that Bokides is asking the Court to go down is endless and could also lead to second guessing plaintiff's decisions to sue or not sue multiple potential defendants and plaintiff's decisions to settle when there are multiple potential defendants.

The other problem with Bokides' suggestion is that it puts the tier of fact in a position of second guessing legal decisions such as the merits of any cause of action Roberta Shore may have against William Shore and whether William Shore is judgment proof. In this case, the Divorce Decree provides that William Shore will indemnify Roberta Shore for "All indebtedness related to the closely held corporation Bear River Farm Equipment, Inc., including, but not limited to, any claims or litigation arising out of the business operated by Bear River Farm Equipment, Inc." Roberta Shore was sued by McCormick on her personal guaranty and it may well be argued that the

indemnity provision in the Divorce Decree only applies to business indebtedness and not personal indebtedness under a personal guaranty. There may be other contested factual and legal issues relating to William Shore's obligations to indemnify Roberta Shore, and it is inappropriate for the trier of fact to attempt to resolve those issues under the guise of an affirmative defense for failure to mitigate. This case would inappropriately turn from a negligene/malpractice action into an indictment of Roberta Shore's legal decisions, her ability to fund a separate lawsuit against William Shore, and a decision as to William Shore's assets, liabilities and financial capability of paying a judgment. Such issues should be beyond the scope of this litigation, irrelevant and prejudicial, and any evidence or argument regarding such should be excluded. The bottom line is that as a matter of law the trier of fact should not be asked to resolved the merits of Roberta Shore's claims against William Shore, second guess the legal decisions of Roberta Shore, and second guess the costs and benefits of attempting to collect a judgment against William Shore.

DATED this 13th day of August, 2010.

RINGERT LAW CHARTERED

By [signature] for:
James G. Reid

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of August, 2010, a true and correct copy of the foregoing was served upon all parties listed below by:

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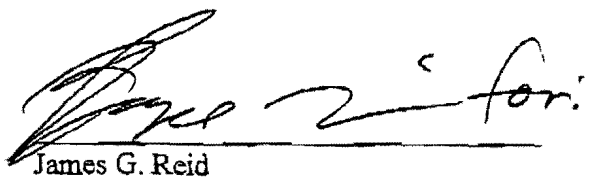

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IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF FRANKLIN

McCORMICK INTERNATIONAL USA, INC., a corporation, Plaintiff, vs. BEAR RIVER EQUIPMENT, INC., a corporation; WILLIAM R. SHORE, an individual; and ROBERTA SHORE, an individual, Defendants.	Case No. CV 08-327 **THIRD-PARTY DEFENDANT'S TRIAL BRIEF**

ROBERTA SHORE, an individual,

Third-Party Plaintiff,

vs.

NICHOLAS BOKIDES, an individual

Third-Party Defendant,

COMES NOW the third-party defendant, Nicholas Bokides ("Bokides"), by and through undersigned counsel, and herewith submits this trial brief.

INTRODUCTION

Nicholas Bokides herewith submits this trial brief in order to provide the court with a legal framework to assist the court in analyzing the issues and claims that remain to be tried in this case. Because the parties have already submitted extensive briefing to the court by way of dispositive motions, Bokides will not reiterate all of the relevant facts and circumstances that give rise to this litigation, but, rather, will focus on the narrow legal issues that remain to be tried, and supplement the briefing that has already been submitted to the court, in order to enable the court to arrive at a correct and just decision.

DISCUSSION

I. ROBERTA SHORE HAS FAILED TO MITIGATE HER DAMAGES AND THEREFORE, HER CLAIMS AGAINST BOKIDES MUST BE DENIED OR, ALTERNATIVELY, REDUCED BY THE AMOUNT SHE COULD HAVE RECOVERED BY SEEKING INDEMNIFICATION FROM WILLIAM SHORE.

It is universally recognized by courts and commentators that a party who has been injured by the conduct of another, whether in contract or in tort, has an obligation to take reasonable steps to mitigate his/her damages. *See e.g.*, *Davis v. First Interstate Bank of Idaho*,

115 Idaho 169, 765 P.2d 680 (1988); *Casey v. Nampa and Meridian Irrigation District*, 85 Idaho 299, 379 P.2d 409 (1963); *Belk v. Martin*, 136 Idaho 652, 39 P.3rd 592 (2001). The duty to mitigate, also known as the doctrine of avoidable consequences, "provides that a plaintiff who is injured by actionable conduct of a defendant is ordinarily denied recovery for damages which could have been avoided by reasonable acts . . . ." *U.S. Bank National Ass'n v. Kuenzli*, 134 Idaho 222, 228, 999 P.2d 877, 883 (2000). The policy underlying the doctrine of avoidable consequences is to prevent "persons against whom wrongs have been committed from ***passively suffering economic loss which could be avoided by reasonable efforts***." *Industrial Leasing Corp. v. Thomason*, 96 Idaho 574, 577, 532 P.2d 918, 919 (1974) quoting *Wright v. Baumann*, 398 P.2d 119 (1965).

Idaho courts have also specifically held that the doctrine of mitigation of damages is applicable to a legal malpractice claim. Thus, in the case of *O'Neil v. Vasseur*, 118 Idaho 257, 796 P.2d 134, the Idaho Supreme Court stated that "if an attorney's negligent conduct in representing a client leaves the client with an alternative remedy or remedies which are both viable and equivalent, ***the result maybe that the client suffers no loss or a reduced loss as the proximate cause of the attorney's negligent conduct***." 118 at 262, quoting *Swanson v. Sheppard*, 445 N.W.2nd 654, 658 (ND 1999).(emphasis added).

The facts and issues in the *O'Neil* case are instructive to the case at bar, because in that case, the defendants lawyer had allegedly committed malpractice by failing to pursue a claim on behalf of the plaintiffs. However, the plaintiffs recognized their duty to mitigate damages, and therefore pursued the claim and recovered, and thereafter brought a legal malpractice claim against the defendants. The Supreme Court specifically endorsed the action of

the plaintiffs in pursuing the litigation, and obtaining a recovery and noted that by doing so, they had fulfilled the duty to mitigate.

> By taking over the *Schuckardt* case and proceeding *pro se*, O'Neil has so far been successful in the lawsuit and has mitigated any damages allegedly caused by the attorneys. It is well established that the party entitled to the benefit of a contract has a duty to use 'reasonable exertion' to mitigate his damages. *Wicker v. Hoppock*, 73 U.S. 94, L.Ed. 752 (1878) . . .
>
> Here, O'Neil had a duty to mitigate the damages he could have suffered by *Vasseur and Jissul's* breach of the attorney-client relationship contract. O'Neil did so. He pursued the *Schuckardt* case *pro se* and was awarded damages therein . . . .

This issue is exemplified in the following cases from other jurisdictions. In *Theobald v. Byers*, 193 Cal.App.2d 147 (Cal. Ct. App. 1961), the plaintiffs had hired the defendant attorney to prepare a note and chattel mortgage in connection with a loan of $5,000 which plaintiffs were making to John Higgins and Charles Fette. Higgins and Fette executed the note and mortgage, but failed to have them acknowledged or recorded, which the defendant attorney failed to verify. Higgins and Fette later filed for bankruptcy, and because of the irregularities in the mortgage, the plaintiffs were relegated to the position of unsecured creditors. The plaintiffs did not file a claim in the bankruptcy, but filed a legal malpractice suit against the defendant attorney. One of the issues on appeal was whether the plaintiffs had taken efforts to reasonably mitigate their damages. The California Court of Appeals held:

> Evidence was produced at the trial that appellants failed to file a claim in bankruptcy as general unsecured creditors of Higgins and Fette, and that had they done so they would have recovered 16.1% of their claim, or the amount of $862.02. ***Since appellants could still have recovered this amount despite the negligence of respondents had they only chosen to file a claim, such sum should be applied to reducing the damages proximately resulting from respondents' negligence.*** Therefore, the judgment is reversed and the cause remanded for a determination of the amount

> which appellants could have recovered in bankruptcy in order that this sum may be deducted from the damages...

Theobald, 193 Cal.App.2d at 153 (emphasis added). Likewise, in *Lewis v. Superior Court*, 77 Cal.App.3d 844 (Cal. Ct. App. 1978). The plaintiff sued her divorce attorney after he allegedly failed to claim an interest in her ex-husband's military pension. The court found that the plaintiff potentially still could assert a claim in the pension even though a final divorce decree had been issued. With respect to mitigation of damages, the court noted:

> Finally, we note that defendant is not required to compensate for damages avoidable by reasonable effort. If plaintiff, by her own action, unnecessarily enhances her loss she may not recover for such enhanced loss. ***Upon trial of the matter defendant may seek to establish that plaintiff has a collectible interest in the pension, and to the extent that this is established defendant will be exonerated from liability.***

Lewis, 77 Cal.App.3d at 853 (emphasis added) (citations omitted).

The cases stand for the proposition that in legal malpractice actions, if there is another potential source of recovery for the plaintiff, then the recovery against the defendant attorney is reduced or eliminated by the amount potentially recoverable. In this case, Roberta Shore could potentially recover against her ex-husband's assets. William Shore is the guarantor of the obligations to McCormick International USA, Inc. ("McCormick"). He is primarily responsible, under the Divorce Decree, notwithstanding Bokides' alleged negligence. Bokides will present evidence at trial that Williams Shore does have assets to at least minimize the claims of McCormick, if not eliminate them altogether.

The case at bar exemplifies the very evils that the doctrine of mitigation was designed to prevent, *i.e.* where a party injured by the conduct of another sits back and passively allows damages to be incurred, without taking any steps to eliminate or reduce those damages.

As discussed more fully below, and as will be demonstrated at trial, Roberta Shore has taken absolutely no steps whatsoever, much less any reasonable steps, to attempt to force her former husband, William Shore, to satisfy part or all of McCormick's claims and judgment, even though William Shore is contractually and legally obligated to defend and indemnify Roberta Shore from those very claims.

A. By failing to retain independent counsel, Roberta Shore was prohibited from taking any steps to mitigate her damages, because of a non-consentable conflict of interest.

As has previously been submitted to the court, the Decree of Divorce between William and Roberta Shore provides that William Shore was obligated to indemnify, defend and hold Roberta Shore harmless for any and all indebtedness related to Bear River Equipment.

> Defendant (William Shore) shall pay undue, and hold plaintiff (Roberta Shore) harmless from the following indebtedness:
>
> All indebtedness related to the closely held corporation Bear River Farm Equipment, Inc., including, but not limited to, ***any claims or litigation against the parties arising out of the business operated by Bear River Farm Equipment, Inc. including attorney fees and costs***.

See Divorce Decree, p. 4, § VI, Exhibit "A" to the Affidavit of Bradley J Williams. (emphasis added).

Upon the filing of the complaint by McCormick against William and Roberta Shore in August of 2008, Roberta Shore should and could have tendered the defense of the case to her ex-husband, William Shore. William Shore would have been required, under the express language of the divorce decree, to both indemnify Roberta Shore, and defend her, by paying any costs and legal fees that would have been incurred. If William Shore would have rejected the tender of defense, than Roberta Shore should and could have filed a cross-claim at that point in

time, seeking to enforce the indemnification provision of the decree in the lawsuit brought by McCormick.

Rather than making any effort or attempt to force William Shore to indemnify and defend her, Roberta Shore did the one thing that effectively precluded her from insisting that William Shore indemnify and defend her; she retained the same law firm that was representing William Shore! More importantly, by failing to retain independent counsel, Roberta Shore was precluded from making any attempt to mitigate her damages. In particular, Rule 1.7 of the Idaho Rules of Professional Conduct, which governs conflicts of interest, provides in relevant part under sub-section "b" as follows:

> (b) Notwithstanding the existence of a concurrent conflict of interest under Paragraph (a), a lawyer may represent a client if:
>
> (3) <u>the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal</u>; . . . .

Under this rule, Roberta Shore's law firm could not assert a claim against William Shore and continue to represent her. Such representation would have constituted a non-consentable conflict. Rather than asserting any claim against William Shore, and take reasonable steps to mitigate her damages, Roberta Shore filed a third-party complaint against her attorney, Nicholas Bokides, alleging that he should be held exclusively responsible for the entire amount of McCormick's judgment against William and Roberta Shore, because of his failure to submit written notices to McCormick that Roberta would no longer be liable on the continuing guarantees.

It is axiomatic that Roberta Shore's law firm had a duty to zealously represent and defend her. Likewise, that firm had the same obligation to vigorously represent and defend

William Shore. Roberta Shore's law firm could not take any steps to seek to enforce the indemnification provisions of the divorce decree against William Shore, while at the same time representing William Shore. Therefore, Roberta Shore has focused all of her efforts and resources on shifting responsibility for William Shore' debts to McCormick on to Bokides, who, is at best, only secondarily liable for damages to Roberta Shore. This is precisely the type of conflict that the foregoing rule was designed to prevent. The comments to subsection (b)(3) state in pertinent part:

> ***Paragraph (b)(3) describes conflicts that are non-consentable because of the institutional interest and vigorous development of each client's position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal.*** Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding.

As discussed above, William Shore has a clear, unequivocal obligation to both defend and indemnify Roberta Shore from any and all indebtedness from Bear River Farm Equipment, Inc., and has clearly admitted this obligation in this case. Given the indemnification provision in the Divorce Decree, Roberta Shore's interests are unquestionably aligned directly against William Shore. Unfortunately, because Roberta and William are represented by the same law firm, there has been not even the slightest effort to "vigorously develop" the claims against William Shore.

Given the patently obvious conflict of interest described above, Roberta Shore was precluded from taking any steps to mitigate her damages and accordingly, as a matter of law, the court should dismiss Roberta Shore's claims against Bokides.

B. Roberta Shore has taken no steps to mitigate her damages, much less any reasonable steps.

In virtually every case that can be found, in Idaho or anywhere else, the courts have stated that a party who has been injured by the actionable conduct of another, must take "reasonable steps" or make "reasonable efforts" or "actions" in order to mitigate his/her damages. In this case, Roberta Shore has not taken any steps whatsoever to mitigate her damages, much less any reasonable ones. Under such circumstances, the court should rule as a matter of law, that Roberta Shore has failed to mitigate her damages and dismiss her claims against Bokides.

When McCormick filed its complaint against Bear River Equipment, William Shore and Roberta Shore, the reasonable steps that Roberta Shore should and could have taken include the following:

1. Hire independent counsel to represent and defend her in the case;

2. Tender the defense of the claims to William Shore, thereby forcing William to retain separate counsel;

3. File a cross-claim against William Shore;

4. Sue to enforce the terms of the divorce decree, which required William Shore to defend and indemnify Roberta;

5. Sue to enforce the terms of the divorce decree, which required William Shore to make good faith efforts to sell the property to satisfy his debts;

6. Propound written discovery to William Shore to discover the current state of his assets;

7. Take depositions of persons with knowledge of William Shore's assets;

8. Send subpoenas to all institutions or banks that may have knowledge of William Shore's wealth or assets;

9. Conduct an asset search to determine assets he may have or may be concealing;

10. Conduct a title search for any and all real property owned by William Shore;

11. Retain an expert to appraise the current value of the property owned by William Shore, as of the time McCormick filed its complaint; and

12. File a brief or affidavits in opposition to the summary judgment motion filed by McCormick, rather than merely passively allowing judgment to be taken and thereafter trying to force Bokides to pay that judgment.

Because Roberta Shore did not take any steps to mitigate her damages, she clearly has not taken reasonable steps to mitigate her damages and therefore, her claims should be dismissed.

C. Roberta Shore is not relieved from her obligation to mitigate damages because of her claim that it might have been futile to make such efforts.

Based on the briefing and discovery that has been conducted in this case, it is apparent that Roberta Shore's excuse for failing to mitigate is that it would have been "futile" to make a claim against William Shore, because he allegedly does not have the financial ability to retire the debt. It is not entirely clear from the record, whether Roberta Shore contends that William Shore has no assets whatsoever, or, conversely, whether she contends that William does not have sufficient assets to satisfy the entire amount of McCormick's judgment, for approximately $320,000. If Roberta Shore's contention is that William Shore had no assets whatsoever, the minimal discovery that has been conducted by Bokides alone demonstrates that

opinion is in error, because William Shore has admitted he has sufficient assets to satisfy at least a portion of the judgment.

On the other hand, if Roberta's claim is that William Shore does not have sufficient assets to satisfy the judgment in its entirety, and therefore she has no duty to mitigate, her argument is contrary to all of the cases and opinions which state a party has a duty to mitigate damages, even if the efforts are only successful in reducing the amount of the damages incurred, as opposed to eliminating the damages in their entirety. *See O'Neil v. Vasseur, Supra.*

Accordingly, "mitigation" is not generally an affirmative theory of recovery. It is a vehicle employed by the defendants to show a plaintiff did not take reasonable steps to minimize its damages. If the defendant is successful, ***the court can reduce or even deny the damages asserted by the plaintiff***. . . . *In Re: JL Korn*, 352 Br 228, D Idaho (2006). *See* also *Clark v. Int'l Harvester Co.*, 99 Idaho 326, 581 P.2d 784, 805 (1978).

Bokides recognizes that under Idaho law, he has the burden or proving that Robert failed to reasonably mitigate her damages. *See Clark v. International Harvester Co.*, 99 Idaho 326, 347, 581 P.2d 784, 805 (1978). However, once the party asserting the affirmative defense has shown that available alternatives existed to the other party which would have minimized the damages, the burden shifts back to the other party to prove that there were no other reasonable alternatives. *Brewster Wallcovering Co. v. Blue Mountain Wall-coverings, Inc.*, 864 N.E.2d 518, 543-544 (Mass. Ct. App. 2007); *Alamo Community College Dist. v. Miller*, 274 S.W.3d 779, 790 (Tex. Ct. App. 2008). Bokides has demonstrated and will demonstrate at trial to the jury that there were and are other alternative sources that from which Roberta could have reduced or even eliminated her damages, *i.e.* by filing a claim against William Shore. The burden then shifts to Roberta to prove that this was not a reasonable alternative source.

Moreover, despite Roberta Shore's self-serving claim that it would have been futile to sue her ex-husband because he was broke, does not relieve her from the obligation of bringing suit, and attempting to pursue her claims of indemnification against him. As the Supreme Court has stated "the doctrine [of avoidable consequences] requires reasonable effort to mitigate damages. Thus, if reasonable, the efforts need not be successful." *Davis v. First Interstate Bank of Idaho, NA*, 115 Idaho 169, 171, 765 P.2d 680 (1988), *citing JP Colamari and JPaid Perillo*, *Contracts* §14-5 (2nd Ed., 1977).

II. IF ROBERTA SHORE HAD MADE ANY EFFORT TO MITIGATE, SHE COULD HAVE ELIMINATED OR AT A MINIMUM, REDUCED HER DAMAGES.

When it became apparent that Roberta Shore did not undertake any efforts to attempt to mitigate her damages and hold William Shore responsible for McCormick's claims, Bokides undertook efforts to conduct discovery to investigate what assets William Shore had available to pay the McCormick's claims. For example, Bokdies submitted written discovery to William Shore and thereafter, took his deposition on March 30, 2010. In connection with the discovery requests propounded by Bokides, William Shore prepared a financial statement in February 2010, demonstrating by his own admission a net worth of approximately $230,000, which would have been available to at least partially satisfy McCormick's claims. Moreover, Bokdies believes the financial statement, which was prepared for purposes of litigation, most likely understated William Shore's net worth, and over exaggerated his liabilities, thereby skewing his real net worth. For example, William Shore owns a ranch property in Council, Idaho which, at the time of the divorce, was valued at approximately $3.6 million dollars. Under the terms of the divorce decree, William Shore was to exercise good faith efforts to market the property.

Roberta Shore testified at her deposition that William Shore was attempting to sell the property in 2007 for approximately $6.5 million. If the sale price was even remotely close to the fair market value of the property, that value would have been more than adequate to satisfy all of the McCormick's claims, and also pay Roberta Shore's lien on the property in the amount of $1.3 million.

Moreover, McCormick filed the initial lawsuit in August 2008, and therefore, the relevant timeframe for determining whether William Shore had any assets was in August 2008, and not two (2) years later in August 2010, at the time of the trial. If the property has declined in value in the last two (2) years then, that further exemplifies Bokides argument that Roberta Shore has not taken reasonable steps to mitigate her damages, by filing a timely cross-claim against William Shore.

On the other hand, if William Shore was deliberately increasing the price of the property well above fair market value, then it is clear that he would not have been acting in good faith in an attempt to market the property, as was his obligation under the divorce decree. Had he attempted to sell the property in good faith, Roberta Shore testified that William received an offer sometime in 2007 for approximately $4 million dollars which again, would have provided William Shore with abundant assets, certainly sufficient to pay the McCormick's claim.

III. ROBERTA SHORE IS NOT ENTITLED TO RECOVER DAMAGES AGAINST BOKIDES FROM THE MCCORMICK JUDGMENT, BECAUSE MCCORMICK HAS NOT, AND MAY NEVER ENFORCE THE JUDGMENT AGAINST ROBERTA SHORE.

As stated in previous briefing by Bokides in support of its motion for summary judgment, the law in Idaho makes clear that a party cannot recover damages in a malpractice action, where there is only a potential for damages. *Chicione v. Bignal*, 122 Idaho 482, 835 P.2d

1293 (1992). At the time Bokdies filed his motion for summary judgment, McCormick had not obtained its judgment. McCormick has since obtained a judgment in June 2010, which judgment is entered in favor of McCormick, and against Bear River Equipment, William Shore and Roberta Shore. It is undisputed that Roberta Shore and William Shore are jointly and severally liable on the continuing guarantees to McCormick.

McCormick has the option of pursuing its judgment against either William Shore, Roberta Shore, or both, to the extent one or the other has insufficient funds to satisfy the entire judgment. If McCormick elects to proceed against William Shore, and records its judgment against the property owned by William Shore, which it may, it would be able foreclose on its claims and sell the property, and receive full reimbursement for its judgment. If McCormick pursues this option, Roberta Shore will suffer no damages.

Roberta Shore may claim, as she did in briefing on the summary judgment, that she suffered damages by way of attorney fees incurred by having to defend against McCormick's claims. Once again, this argument is erroneous. First, if Roberta Shore would have tendered the defense to William Shore, he was required to defend and indemnify her, from any and all claims, including costs and attorney fees.

Moreover, since the undisputed evidence shows that at least one tractor was sold to Bear River, in August 2006, if Bokides testimony is believed, and he was not required to send a written notice until November 2006, McCormick would have brought suit against Roberta Shore in any event and she would still have been required to hire an attorney and incur those costs and fees. Roberta Shore has offered no evidence that McCormick would have released her from the guaranty, even if Bokides would have sent written notice.

IV. IN ADDITION TO THE FOREGOING DEFENSES, BOKIDES HAS ALSO RAISED AFFIRMATIVE DEFENSES OF WAIVER, ESTOPPEL AND UNCLEAN HANDS.

Bokides believes that the central issue in this case revolves around Roberta Shore's duty and consequent failure to discharge her duty to mitigate damages. However, in addition to the mitigation defense, Bokides has also raised affirmative defenses for waiver, estoppel and unclean hands, and will present evidence at trial in furtherance of those defenses.

DATED this 12th day of August, 2010.

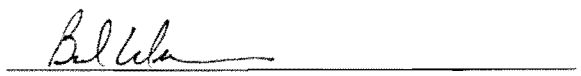
MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED

By _____
Bradley J Williams – Of the Firm
Attorneys for Nicholas Bokides

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of August, 2010, I caused a true and correct copy of the foregoing **THIRD-PARTY DEFENDANT'S TRIAL BRIEF** to be served by the method indicated below, and addressed to the following:

Steven R. Fuller STEVEN R. FULLER LAW OFFICE 24 North State P.O. Box 191 Preston, ID 83262 *Attorney for Plaintiff*	( ) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail (X) Facsimile
James G. Reid Laura E. Burri RINGERT LAW CHARTERED 455 S. Third P.O. Box 2773 Boise, ID 83701-2773 Facsimile: (208) 342-4657 *Attorneys for Defendants and Third-Party Plaintiff Roberta Shore*	( ) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail (X) Facsimile
Honorable Mitchell W. Brown District Judge 159 South Main Soda Springs, ID 83276 *Chambers Copy*	( ) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail (X) Facsimile



Bradley J Williams

JAMES G. REID, ISB #1372
S. BRYCE FARRIS, ISB #5636
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455 S. Third, P. O. Box 2773
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Attorneys for Defendants

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF FRANKLIN

MCCORMICK INTERNATIONAL USA, INC., a corporation Plaintiff, vs. BEAR RIVER EQUIPMENT, INC., a corporation, WILLIAM R. SHORE an individual; and ROBERTA SHORE, an individual, Defendants.	* * *)	Case No. CV 08-327 THIRD-PARTY PLAINTIFF'S PROPOSED EXHIBIT LIST
ROBERTA SHORE, an individual, Third-Party Plaintiff, vs.	)	

NICHOLAS BOKIDES, an individual,)
)
Third-Party Defendant.)
*
*
*

Presiding Judge	Third-Party Plaintiff's Attorney	Third Party Defendant's Attorney
Mitchell W. Brown	James G. Reid	Bradley J. Williams Charles E. Cather, III

Trial Dates	Court Reporter:	Courtroom Deputy:
August 24-26, 2010	Dorothy Snarr	Linda Hampton

PLF. NO.	DESCRIPTION OF EXHIBITS	DATE	ID	OFFD	OBJ	ADMIT
101	Guaranty					
102	Guaranty					
103	Decree of Divorce					
104	Agreement to Indemnify					
105	August 30, 2007 Demand Letter					
106	Internal Revenue Service Deficiency Notices					
107	Idaho State Tax Commission Deficiency Notices					
108	Memorandum Decision in Shore v. Peterson					
109	Merrill & Merrill Bill for Attorney Fees					
110	Closing Document for Sale of Ranch					
111	Agreement for Purchase of Preston Property					

112	Mortgage on Ranch					
113	February 2010 Financial Statement of Bill Shore					
114	Bokides' Office File notes for Roberta Shore					

Dated this 13th day of August, 2010.

RINGERT LAW CHARTERED

By _____
S. Bryce Farris

CERTIFICATE OF SERVICE

I hereby certify that on the 13 day of August, 2010, a true and correct copy of the foregoing was served upon all parties listed below by:

(X) U. S. mail, postage prepaid
( ) hand delivery
( ) express mail
( ) facsimile

Steven R. Fuller
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24 North State
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Preston, ID 83262

Ed Cather
Moffatt, Thomas
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Idaho Falls, ID 83405-1505

S. Bryce Farris

FILED

10 AUG 17 PM 1:22

FRANKLIN COUNTY CLERK

L Hampton DEPUTY

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Attorneys for Nicholas Bokides

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF FRANKLIN

McCORMICK INTERNATIONAL USA, INC., a corporation, Plaintiff, vs. BEAR RIVER EQUIPMENT, INC., a corporation; WILLIAM R. SHORE, an individual; and ROBERTA SHORE, an individual, Defendants.	Case No. CV 08-327 **THIRD-PARTY DEFENDANT'S FINAL EXHIBIT LIST FOR TRIAL**

ROBERTA SHORE, an individual,

Third-Party Plaintiff,

vs.

NICHOLAS BOKIDES, an individual

Third-Party Defendant,

COMES NOW the third-party defendant, Nicholas Bokides, by and through undersigned counsel, and pursuant to this Court's Scheduling Order, Notice of Trial Setting & Initial Pretrial Order issued April 9, 2010, and I.R.C.P. 16(h), hereby submits the following list of exhibits Nicholas Bokides may offer at trial:

See attached Exhibit "A" hereto and incorporated herein.

Third-Party Defendant hereby reserves its right to supplement this exhibit list and to use any pleading filed/lodged with the Court in this litigation. Further, Third-Party Defendant reserves the right to use enlargements of any exhibit for demonstrative purposes at trial. Third-Party Defendant also reserves the right to utilize any exhibit offered by any other party to this litigation.

DATED this 16th day of August, 2010.

MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED

By _____
Bradley J Williams – Of the Firm
Attorneys for Nicholas Bokides

CERTIFICATE OF SERVICE

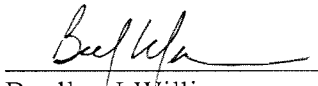
I HEREBY CERTIFY that on this 16th day of August, 2010, I caused a true and correct copy of the foregoing **THIRD-PARTY DEFENDANT'S FINAL EXHIBIT LIST FOR TRIAL** to be served by the method indicated below, and addressed to the following:

James G. Reid
Laura E. Burri
RINGERT LAW CHARTERED
455 S. Third
P.O. Box 2773
Boise, ID 83701-2773
Facsimile: (208) 342-4657
Attorneys for Defendants and Third-Party Plaintiff Roberta Shore

( ) U.S. Mail, Postage Prepaid
( ) Hand Delivered
(X) Overnight Mail
( ) Facsimile

Honorable Mitchell W. Brown
District Judge
Franklin County Courthouse
39 W. Oneida
Preston, ID 83263
Copy included in with Clerk's original

( ) U.S. Mail, Postage Prepaid
( ) Hand Delivered
(X) Overnight Mail
( ) Facsimile



Bradley J Williams

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF FRANKLIN

* * * * * *

McCORMICK INTERNATIONAL USA, INC.., a corporation Plaintiff, vs. BEAR RIVER EQUIPMENT, INC., a Corporation; WILLIAM R. SHORE, an individual; and ROBERTA SHORE, an individual, Defendants.	Case No. CV-2008-327 MINUTE ENTRY AND ORDER
ROBERTA SHORE, an individual, Third-Party Plaintiff, vs. NICHOLAS BOKIDES, an individual Third-Party Defendant.	

This matter came before the Court as regularly scheduled for Court Trial. James Reid appeared for and on behalf of Third-Party Plaintiff and Bradley Williams appeared for and on behalf of the Third-Party Defendant.

The Court met in chambers with counsel regarding any preliminary issues. The parties stipulated to the admission of all submitted exhibits, subject to relevance objections. During the course of the trial, Third Party Plaintiff's submitted Exhibits 101 through 115 and Third Party

Defendant's submitted Exhibits 201 through 217, 219, 220.2 and 220.3. All exhibits were admitted without objection.

Third-Party Defendant Nicholas Bokides filed his Motion to Amend Answer, Third-Party Defendant Nicholas Bokides' Amended Answer to Third-Party Complaint and Demand for Jury Trial, and Memorandum in Support of Third-Party Defendant Nicholas Bokides' Motion to Amend Answer.

The Court granted Mr. Reid a continuing objection with respect to evidence associated to the failure to mitigate issue because Third Party Defendant had failed to raise the same as an affirmative defense. The Court advised that the parties would be allowed to present evidence on this issue and the Court would address the propriety of the mitigation affirmative defense in its Findings of Fact, Conclusions of Law and Memorandum Decision and Order.

The following named persons were sworn testified and cross examined: Roberta Shore, William Shore and Nicholas Bokides.

At the conclusion of the parties respective cases the Court ordered that the parties submit Proposed Findings of Fact and Conclusions of Law along with closing arguments. The Third-Party Plaintiff shall submit his Proposed Findings of Fact and Conclusions of Law and Closing Argument on or before September 7, 2010. Third-Party Defendant shall submit his Proposed Findings of Fact and Conclusions of Law and Closing Argument on or before September 14, 2010. Finally, Third-Party Plaintiff's Final Argument shall be submitted on or before September 21, 2010. Once all documents have been submitted the Court will take under advisement and issue a written decision.

IT IS SO ORDERED.

DATED: August 24, 2010

Mitchell W. Brown
MITCHELL W. BROWN
District Judge

CERTIFICATE OF MAILING/SERVICE

I hereby certify that on August 27, 2010, I mailed/served/faxed a true copy of the foregoing document on the attorney(s)/person(s) listed below by mail with correct postage thereon or causing the same to be hand delivered.

Attorney(s)/Person(s):	Method of Service:
James G. Reid Attorney for Roberta Shore	Faxed: (208) 342-4657
Bradley Williams Attorney for Nicholas Bokides	Faxed: 522-5111

V. ELLIOTT LARSEN, Clerk

BY: Linda Hampton
Linda Hampton, Deputy

TRANSACTION REPORT

AUG/27/2010/FRI 03:52 PM

FAX(TX)

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TRANSACTION REPORT

AUG/27/2010/FRI 03:52 PM

FAX(TX)

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FILED

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FRANKLIN COUNTY CLERK

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Attorneys for Nicholas Bokides

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF FRANKLIN

McCORMICK INTERNATIONAL USA, INC., a corporation, Plaintiff, vs. BEAR RIVER EQUIPMENT, INC., a corporation; WILLIAM R. SHORE, an individual; and ROBERTA SHORE, an individual, Defendants. ROBERTA SHORE, an individual, Third-Party Plaintiff, vs. NICHOLAS BOKIDES, an individual, Third-Party Defendant.	Case No. CV 08-327 **THIRD-PARTY DEFENDANT NICHOLAS BOKIDES' MOTION TO AMEND ANSWER**

COMES NOW the Third-Party Defendant, Nicholas Bokides, by and through his counsel of record MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHTD, and pursuant to Rules 15(a) and 15(b) of the Idaho Rules of Civil Procedure and other applicable law, hereby moves this Court for an order permitting Third-Party Defendant to amend his Answer in the manner reflected in the Amended Answer, attached hereto as Exhibit A, in order to assert the affirmative defense of failure to mitigate damages. This motion is supported by the accompanying *Memorandum in Support of Third-Party Defendant, Nicholas Bokides' Motion to Amend Complaint.*

DATED this 24 day of August, 2010.

MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED

By _____
Bradley J Williams – Of the Firm
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24 day of August, 2010, I caused a true and correct copy of the foregoing **THIRD-PARTY DEFENDANT NICHOLAS BOKIDES' MOTION TO AMEND ANSWER** to be served by the method indicated below, and addressed to the following:

Steven R. Fuller
STEVEN R. FULLER LAW OFFICE
24 North State
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Preston, ID 83262
Attorney for Plaintiff

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(X) Hand Delivered
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( ) Facsimile

James G. Reid
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Attorneys for Defendants and Third-Party Plaintiff Roberta Shore

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(X) Hand Delivered
( ) Overnight Mail
( ) Facsimile

Honorable Mitchell W. Brown
District Judge
159 South Main
Soda Springs, ID 83276
Chambers Copy

( ) U.S. Mail, Postage Prepaid
(X) Hand Delivered
( ) Overnight Mail
( ) Facsimile

Bradley J Williams

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Attorneys for Nicholas Bokides

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF FRANKLIN

McCORMICK INTERNATIONAL USA, INC., a corporation, Plaintiff, vs. BEAR RIVER EQUIPMENT, INC., a corporation; WILLIAM R. SHORE, an individual; and ROBERTA SHORE, an individual, Defendants.	Case No. CV 08-327 **THIRD-PARTY DEFENDANT NICHOLAS BOKIDES' AMENDED ANSWER TO THIRD-PARTY COMPLAINT AND DEMAND FOR JURY TRIAL**

ROBERTA SHORE, an individual,

Third-Party Plaintiff,

vs.

NICHOLAS BOKIDES, an individual

Third-Party Defendant,

COMES NOW the third-party defendant, Nicholas Bokides, by and through undersigned counsel, and as his answer to the Third-Party Complaint and Demand for Jury Trial responds and alleges as follows.

FIRST DEFENSE

I.

Third-Party Plaintiff's Complaint fails to state a claim upon which relief can be granted and therefore should be dismissed.

SECOND DEFENSE

II.

Third-Party Defendant denies each and every allegation of the Third-Party Complaint that is not specifically and expressly admitted in this answer.

III.

Third-Party Defendant admits the allegations of Paragraphs 1,2, 3, and 4 of the Third-Party Complaint.

IV.

Responding to Paragraph 5 of the Third-Party Complaint, Third-Party Defendant states that the personal guarantee speaks for itself. All other allegations contained therein are denied.

V.

Responding to Paragraph 6 of the Third-Party Complaint, Third-Party Defendant states that Third-Party Plaintiff delivered a letter addressed to Agri Credit Corporation for mailing by Third-Party Defendant. All other allegations contained therein are denied.

VI.

Responding to Paragraph 7 of the Third-Party Complaint, Third-Party Defendant states that he failed to mail Third-Party Plaintiff's letter addressed to Agri Credit Corporation as requested. Third-Party Defendant denies the remaining allegations of this paragraph.

VII.

Responding to Paragraph 8 of the Third-Party Complaint, Third-Party Defendant states that the allegations are a matter or record and further states that he lacks sufficient information and knowledge to form a belief as to the truth of the allegations and therefore denies the same.

VIII.

Third-Party Defendant lacks sufficient information and knowledge to form a belief as to the truth of Paragraph 9 of the Third-Party Complaint and therefore denies the same.

IX.

Third-Party Defendant denies the allegations of Paragraph 10 of the Third-Party Complaint.

X.

Responding to Paragraph 11 of the Third-Party Complaint, Third-Party Defendant states that he failed to mail Third-Party Plaintiff's letter addressed to Agri Credit Corporation as requested. Third-Party Defendant denies the remaining allegations of this paragraph.

XI.

Third-Party Defendant denies the allegations of Paragraphs 12 and 13 of the Third-Party Complaint.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

XII.

Recovery against the Third-Party Defendant is barred because no act or omission of the Third-Party Defendant caused or contributed to any of Third-Party Plaintiff's alleged injuries or damages.

SECOND AFFIRMATIVE DEFENSE

XIII.

Third-Party Plaintiff's damages, if any, were proximately caused by the negligence or fault of parties, persons or entities other than the Third-Party Defendant, including the Third-Party Plaintiff. The negligence or fault of all persons must be compared under the comparative negligence laws of the state of Idaho. In asserting this defense, the Third-Party Defendant does not admit that he was guilty of any negligent or culpable conduct and, to the contrary, expressly denies any such conduct on his part.

THIRD AFFIRMATIVE DEFENSE

XIV.

Third-Party Plaintiff's claims are barred by the doctrines of waiver and estoppel.

FOURTH AFFIRMATIVE DEFENSE

XV.

Third-Party Plaintiff's action is prematurely brought and is not ripe for adjudication.

FIFTH AFFIRMATIVE DEFENSE

XVI.

Third-Party Plaintiff's former spouse, William R. Shore, agreed to pay when due and indemnify and hold Third-Party Plaintiff harmless from all indebtedness related to Bear River Equipment, Inc., including attorney fees and costs. Accordingly, William R. Shore is the person primarily responsible for Third-Party Plaintiff's injuries alleged in the Third-Party Complaint.

SIXTH AFFIRMATIVE DEFENSE

XVII.

Third-Party Plaintiff's claims, or some of them, are barred to the extent they are beyond the scope of Third-Party Defendant's representation.

SEVENTH AFFIRMATIVE DEFENSE

XVIII.

Third-Party Plaintiff's damages, if any, are subject to the limitation on non-economic damages pursuant to Idaho Code § 6-1603.

EIGHTH AFFIRMATIVE DEFENSE

XIX.

Third-Party Defendant met the standard of practice applicable to him as an attorney licensed to practice law in the state of Idaho. At the time and place of the alleged malpractice, and at all times, Third-Party Defendant used reasonable care and diligence in the exercise of his judgment, skill, and the application of his learning in accordance with his best judgment and the consent of Third-Party Plaintiff. Third-Party Defendant in no way breached or deviated from the standard of care.

NINTH AFFIRMATIVE DEFENSE

XX.

Third-Party Plaintiff's claims may be barred by the statute of limitations.

TENTH AFFIRMATIVE DEFENSE

XXI.

Third-Party Plaintiff failed to mitigate her damages.

ELEVENTH AFFIRMATIVE DEFENSE

XXII.

By raising the above defenses, Third-Party Defendant makes no admission of any kind and does not assume any burdens of proof or production not otherwise properly resting upon him in this lawsuit. Rather, Third-Party Defendant merely identifies defenses to preserve them for all proper uses under applicable law. Third-Party Defendant has yet to complete discovery in this case, the result of which may reveal additional defenses to the Third-Party Plaintiff's Complaint. As such, Third-Party Defendant reserves the right to supplement, modify, or delete defenses after discovery is completed.

WHEREFORE, Third-Party Defendant prays for judgment:

1. Dismissing the Third-Party Plaintiff's Complaint with prejudice, without granting any of the relief requested against the Third-Party Defendant;

2. Awarding Third-Party Defendant his reasonable costs and attorney fees incurred in defending this action;

3. For such other relief as the Court deems to be just and equitable under the circumstances.

DATED this 24 day of August, 2010.

MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED

By _____
Bradley J Williams – Of the Firm
Attorneys for Nicholas Bokides

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24 day of August, 2010, I caused a true and correct copy of the foregoing **THIRD-PARTY DEFENDANT NICHOLAS BOKIDES' AMENDED ANSWER TO THIRD-PARTY COMPLAINT AND DEMAND FOR JURY TRIAL** to be served by the method indicated below, and addressed to the following:

Steven R. Fuller STEVEN R. FULLER LAW OFFICE 24 North State P.O. Box 191 Preston, ID 83262 *Attorney for Plaintiff*	( ) U.S. Mail, Postage Prepaid (X) Hand Delivered ( ) Overnight Mail ( ) Facsimile
James G. Reid Laura E. Burri RINGERT LAW CHARTERED 455 S. Third P.O. Box 2773 Boise, ID 83701-2773 Facsimile: (208) 342-4657 *Attorneys for Defendants and Third-Party Plaintiff Roberta Shore*	( ) U.S. Mail, Postage Prepaid (X) Hand Delivered ( ) Overnight Mail ( ) Facsimile
Honorable Mitchell W. Brown District Judge 159 South Main Soda Springs, ID 83276 *Chambers Copy*	( ) U.S. Mail, Postage Prepaid (X) Hand Delivered ( ) Overnight Mail ( ) Facsimile

Bradley J Williams